HUMAN RIGHTS

Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region

Report

Kathmandu, 26-28 February 1996

UNITED NATIONS

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Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region

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New York and Geneva, 1996

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I. BACKGROUND AND PREPARATION OF THE WORKSHOP

Pursuant to Commission on Human Rights resolution 1995/48 of 3 March 1995, the Centre for Human Rights, in cooperation with the Government of Nepal, organized the Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region, which was held in Kathmandu from 26 to 28 February 1996. The workshop was organized under the Centre's Programme of Technical Cooperation in the Field of Human Rights.

The long-term objective of the workshop was to ensure the promotion and protection of human rights in the Asian and Pacific region through the establishment of an effective regional human rights mechanism. The immediate objective was to define a process for the eventual establishment of such a mechanism.

The workshop was prepared on the basis of the achievements of three previous workshops, held in Manila (Philippines) (1990), Jakarta (Indonesia) (1993) and Seoul (Republic of Korea) (1994), as well as a seminar held in Colombo (Sri Lanka) in 1982. In view of the crucial stage which the process had entered, special attention was given to the preparation of the Kathmandu workshop, which was organized in close cooperation with the Governments of the region, through the host Government, and in consultation with relevant non-governmental organizations (NGOs). On the understanding that it was premature, at the current stage, to discuss specific arrangements relating to the setting up of a formal human rights mechanism in the Asian and Pacific region, such as those existing in Europe, the Americas or Africa, the workshop put emphasis on exploring the options available and the process necessary for establishing a regional mechanism. In this connection, a number of documents were produced in advance, including a technical cooperation project document outlining objectives, activities and inputs for the successful holding of the workshop, and three workshop papers by internationally recognized experts on regional human rights arrangements. These papers formed the basis for discussion at the workshop and helped to focus the debate.

II. PARTICIPATION

The workshop enjoyed the widest participation in the series held to date, including, for the first time, representation from countries in West Asia. The Governments of the following 30 States were represented: Afghanistan, Australia, Bangladesh, Bhutan, China, Democratic People's Republic of Korea, Fiji, India, Indonesia, Iran (Islamic Republic of), Iraq, Japan, Jordan, Malaysia, Maldives, Micronesia (Federated States of), Myanmar, Nepal, New Zealand, Papua New Guinea, Philippines, Republic of Korea, Saudi Arabia, Singapore, Solomon Islands, Sri Lanka, Syrian Arab Republic, Thailand, United Arab Emirates and Viet Nam. Palestine was also represented at the workshop. Nine non-governmental organizations, both local and regional, as well as representatives from national human rights commissions, participated as observers. United Nations and other intergovernmental agencies, as well as embassies in Kathmandu of countries from other regions, also sent observers.

Prior to the workshop, a one-day NGO symposium entitled ''Prospects and challenges for intergovernmental human rights instruments in Asia and the Pacific: An NGO perspective'' brought together many regional and Nepalese NGO representatives. Various NGO concerns and strategies were discussed and recommendations were made.

III. SUMMARY OF PROCEEDINGS

The opening statements by the Minister for Foreign Affairs of Nepal and the United Nations High Commissioner for Human Rights began the discussion in a constructive and cooperative atmosphere. A general willingness to achieve concrete progress was expressed from the beginning by many of the participants, who hoped that the Kathmandu workshop would identify specific steps that could be taken towards the establishment of regional arrangements for human rights. All the delegates who spoke during the debates expressed their Governments' willingness to cooperate in the implementation of such steps.

It was stressed that, given the diversities and complexities of the region, the process of establishing a regional arrangement would have to be initiated on a step-by-step basis with the sharing of information and experience and the building up of national capacities for the promotion and protection of human rights to help accelerate progress. Specific steps that could serve as confidence-building measures were needed.

All the participants agreed on the importance of being clear on the rationale for a human rights arrangement in the Asian and Pacific region. It was strongly emphasized that the fact that all other regions had human rights arrangements was not sufficient justification. It was on the basis of the needs and priorities of the Asian and Pacific region that the case for yet another regional human rights mechanism rested. While the experiences of other regions would be carefully examined, it was clear that a regional arrangement for the Asian and Pacific region would need to be designed on the basis of the conditions prevailing in the region. Accordingly, the roles, functions and tasks of a regional human rights arrangement in the Asian and Pacific region would be identified by the Governments of the countries of the region, which would need to develop consensus as to what the desired outcomes and achievements were. A series of consultative arrangements with promotional mandates on information and education would serve as building blocks towards a regional arrangement.

Many areas for regional cooperation were discussed as the next stage in a step-by-step process towards the establishment of a regional human rights arrangement, including the promotion of human rights education; building national capacities; developing strategies for the promotion and

progressive realization of the right to development; developing regional and subregional human rights jurisprudence through the judiciary in countries where such an approach was appropriate; identifying shared human rights problem areas in the region; and expanding ratification of international human rights instruments.

The development of strategies for the promotion and progressive realization of the right to development, and the role of regional cooperation thereon, were of interest to several delegates, especially in view of the interrelationships and linkages between development, human rights and democracy as reiterated in the Vienna Declaration and Programme of Action.[1] Issues raised in the discussion included the identification of obstacles to the realization of the right to development resulting from economic policies of industrialized countries outside the region, or from coercive measures imposed from outside the region on developing countries in the region. Discussion regarding these issues was limited by time constraints and they were deferred for further deliberation in the process leading to, and at, the next workshop.

The participation of Governments from West Asia for the first time in this process was highly appreciated and welcomed. The human rights concerns of many countries in West Asia were expressed at the workshop, which recognized the need for further discussion of these issues at future workshops.

After the adoption of the workshop conclusions, the representative of Australia spoke on behalf of the Pacific country delegates and requested that the text of the statement be attached to the workshop conclusions. The Chairman said that, since the workshop conclusions had already been adopted, these observations would form part of the proceedings. The following is the text of the statement:

> "The Pacific country delegates to the fourth workshop on regional human rights arrangements recommend that further consideration be given to the establishment of an officials meeting to be held in parallel with regional meetings of national human rights institutions to form the basis of a regional arrangement to advance the protection and promotion of human rights in the Asia-Pacific region. Participation in the officials meeting should not in our view be restricted to countries with existing national human rights institutions. The Pacific country delegates request that the open-ended team include the item in the agenda for the fifth workshop on regional human rights arrangements."

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[1] Adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF.157/24 (Part I), chap. III).

Participants believed it was important to build on the momentum gained in Kathmandu in the run-up to the next workshop and beyond. The planning and design of the next workshop being especially important, it was crucial that consultations be initiated as soon as possible by the open-ended team.

IV. SUMMARY OF WORKSHOP CONCLUSIONS

It is significant that the workshop ended whith the adoption of agreed conclusions, instead of Chairman's concluding remarks—the first time a workshop in the series has done so. This development represents the achievement of consensus which will serve as a concrete basis for the work of future workshops. The workshop conclusions identified steps towards the establishment of a regional arrangement, with emphasis on regional cooperation on issues such as human rights education, ratification of human rights instruments, development of national action plans, and the important role played by national institutions and NGOs. The workshop conclusions are contained in section VII of the present report.

The workshop decided to set up, for the first time, an open-ended team comprised of representatives of interested Governments of the region and the Centre for Human Rights. The team will consult with all concerned, including Governments, national human rights institutions and NGOs, to prepare for the next workshop envisaged for the end of 1996. The team will also develop proposals for moving closer to achieving the long-term objective of establishing a regional human rights arrangement.

V. OPENING ADDRESS BY DR. PRAKASH CHANDRA LOHANI MINISTER FOR FOREIGN AFFAIRS OF NEPAL

High Commissioner for Human Rights, Mr. Ayala-Lasso, Excellencies, distinguished participants, ladies and gentlemen,

I am delighted to extend a hearty welcome to Nepal to the distinguished visitors from friendly countries and the United Nations Centre for Human Rights and wish you all a happy stay in Kathmandu.

It gives us great pleasure that the regional community has given Nepal the opportunity to organize the Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region. We will be deeply honoured if this meeting is able to make a significant contribution to the evolution of a much-needed consensus to launch a regional framework for the promotion of human rights.

The United Nations High Commissioner for Human Rights, Mr. José Ayala-Lasso, deserves our sincere appreciation for his illustrious task in the promotion of human rights throughout the world. His presence here is eloquent testimony to his commitment to achieving this august objective through the fostering of regional processes.

His Majesty's Government wishes to express its gratitude to the United Nations Centre for Human Rights and to the Government of the Republic of Korea for their invaluable support in organizing this workshop. We are equally grateful to all those friendly countries which have encouraged us by sending their representatives to participate in this event. We also appreciate the interest shown by non-governmental organizations in this regional process.

Human beings are at the centre of all development endeavours. Preservation of their rights, therefore, deserves our foremost attention. Human rights are the hallmarks of democratic societies. At no time since the Universal Declaration of Human Rights was adopted by the international community in 1948 have democratic governance and human rights been more recognized as integral and major parameters of human advancement across the

world than in the post-cold war era. I am happy to note that human rights are now receiving fresh impetus as measures of human worth and dignity.

As a result of the wealth of human rights provisions the world has embraced, a number of global mechanisms have come into existence. Regional mechanisms have followed in other parts of the world. The Asian and Pacific region has yet to invent its own arrangements. It has, none the less, made remarkable progress in previous workshops like this one towards finding common ground. Now is the time for us to consolidate and expand our areas of agreement so that a suitable regional apparatus for the promotion of human rights can be set up without much delay.

Nepal believes in an integrated approach to democracy, development and human rights. They are the "tripod" supporting a civilized society and, as such, one must not be obtained at the expense of another. In this context, let me reiterate our firm belief that all human rights are interdependent and indivisible, and must be advanced with equal priority. The right to development is a cardinal right for the people of developing countries, a fact now reaffirmed by the international community on many occasions. We deeply regret any effort to trivialize human rights norms through their selective application for extraneous purposes.

Regional arrangements for human rights must emerge from a consensual process among the countries of Asia and the Pacific. They must respect the sovereignty and cultural particularities of the States in the region and must be a genuine facilitator for the advancement of human rights.

Human rights define our individual existence and nurture our dignity, and sovereignty gives us a distinct identity as a nation. Both are precious to us. Moreover, it has been recognized by the global community that, although human rights are universal values, their implementation remains the responsibility of individual countries. Striking a proper balance between these various key elements is not an easy challenge for us. It will rigorously test our wisdom, ingenuity and tolerance as we strive together to converge at a moral high ground. But I believe it is not at all impossible if we try to understand each other's constraints and accommodate mutual aspirations.

Several options are available to us in our search for a regional arrangement for human rights. Nepal earnestly wishes to see a modest beginning made as soon as possible. Such a beginning will offer us flexibility as well as opportunity to build further on our collective experience. Since human rights are constantly being established, enriched and expanded, we need also to be continually on the upgrade to cope with a progressively vast panoply of human rights issues at the regional level in the coming years.

We are moving towards the close of a century and a millennium. The founders of the United Nations have enshrined in its Charter such lofty goals as the promotion of international peace, development, equity, justice and human rights for everyone in the world. The onerous responsibility of translating the grand vision of the Charter into concrete achievements now rests on our shoulders. We must therefore work individually as well as collectively at all levels to make our world a better place in which to live for both ourselves and our children. The creation of regional human rights arrangements will be a crucial step forward in the attainment of our cherished goals.

Finally, I hope that you will have fruitful discussions and a worthy outcome of the workshop, something of which we can really be proud. I would also encourage you to find time to get to know Kathmandu and enjoy the rich art and architecture of the city.

I wish all success for the workshop.

Thank you all for your attention.

VI. OPENING ADDRESS BY MR. JOSÉ AYALA-LASSO UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Excellencies, distinguished guests, dear friends, ladies and gentlemen,

It is with great pleasure that I welcome you all, on behalf of the United Nations, to this Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific region. To His Majesty the King, to you, Dr. Prakash Chandra Lohani, and to the Government and people of Nepal, I offer my most sincere thanks for your gracious hospitality, and for the warm reception which you have afforded all of us.

Mr. Chairman, it is in a great Asian philosophical tradition that we find guidance for the important work ahead of us:

> *"If you know not to which port you are sailing,*
> *no wind will take you there."*

These words of Confucius are as relevant today as they were the moment they were first spoken. What brings us together here is the shared conviction of the Governments and peoples of Asia and the Pacific that a regional course must be charted, as it is only through careful planning that a successful journey to a better future for the region can be assured.

Permit me then to suggest what I see as the six fundamental elements for charting a common course for the promotion of human rights in Asia and the Pacific.

1. Reaffirming the universality of human rights standards

To be sure, ladies and gentlemen, there is much to be done, in all regions of the world, before we reach our common goals of democracy, development and human rights. But we can take comfort in the fact that much has been accomplished since, half a century ago, the United Nations committed itself to advancing those very goals.

Indeed, how much we have built together, including humankind's most precious achievement—the codification of a body of international laws and declarations addressing virtually every facet of human interaction, and the conduct of civilized nations. Consistent with the provisions of Article 1 of the Charter of the United Nations, the Organization's activities in the field of human rights have, for 50 years, been devoted to promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

The collective result of these efforts has been the formulation of what the Secretary-General, in his statement at the opening of the World Conference on Human Rights in June 1993, called a "common language of humanity".

That language of human rights has been richly endowed by the United Nations with universal standards, international mechanisms and a solid ethical and legal framework for the rights and responsibilities of nations and people in their daily conduct. It has been developed by the full community of nations, including each and every one of the countries represented here, and its universal character has been endorsed by all Governments in this region. Its lexicon is to be found in the Universal Declaration of Human Rights, the Proclamation of Teheran and, most recently, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights.

Let there be no doubt that, from Beirut to Tokyo, from Beijing to Canberra, from Ulaanbaatar to Port Moresby, as we step into the twenty-first century, we do so speaking the single, common, universal and enduring language of human rights.

2. Restoring normative symmetry to human rights

As we explore the various options for strengthening regional cooperation for human rights in Asia and the Pacific, we must be ever mindful of our responsibility to work together in restoring the symmetry of human rights discourse. We must finally and definitively put to rest the tired, old and divisive notions that some categories of rights are somehow more fundamental than others. The framework for human rights protection, from this point forward, must be based on the universally agreed logic of the Vienna Declaration and Programme of Action, in which the World Conference on Human Rights declared in 1993:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

So much time was lost in cold war, east-west and north-south wrangling over this imaginary issue. We must lose no more, but must move ahead towards the development of integrated strategies for the promotion of all civil, cultural, economic, political and social rights, including the right to development. To paraphrase President Nelson Mandela of South Africa, "no one should ever be forced to choose between bread and ballots". In Asia as in Africa, and all across the world, the birthright of every member of the human family is nothing less than the full range of human rights and fundamental freedoms set forth in the International Bill of Human Rights.

3. Strengthening regional cooperation

The subject of this workshop is, of course, regional arrangements. This is no accident, but reflects the priority attached by the Asian and Pacific group of nations to strengthening regional cooperation in the field of human rights, including through new regional mechanisms.

That priority first emerged in 1982, when, following a resolution of the General Assembly, a United Nations-sponsored seminar on the subject was held in Colombo. Subsequently, three regional workshops further examined the issue, in Manila in 1990, in Jakarta in1993, and in Seoul in 1994. Today, in Kathmandu, this fourth regional workshop stands poised to advance significantly this evolving initiative, with specific recommendations for cooperative regional action in the field of human rights.

The Asian and Pacific community of nations has thus realized that multilateralism and regional cooperation hold out the best hope for advancing the cause of human rights in this century and the next. We must pool our resources, our expertise and our experiences if we are to meet our obligation under the Charter to achieve meaningful international cooperation in promoting and protecting human rights.

The challenges at hand are these:

- to recommit to the principle of regional cooperation in Asia and the Pacific in maintaining international peace and security, in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and protecting human rights and fundamental freedoms;
- to develop new, creative regional responses to large-scale crises and threats to peace, security and human rights in the region;
- to secure for the international human rights mission of the Asian and Pacific family of nations the political, economic and develop-

ment resources which it so urgently requires to carry out its all-important tasks in creating a safer, more secure and more dignified future for the children of this great region.

Today, ladies and gentlemen, you and I must embrace a new challenge. We must agree to take the next vital step in building an international human rights system capable of ensuring, once and for all, that there will be no more massive human rights crises. We must not turn away from the tears of the victim, nor rest on the laurels of our accomplishments. For 50 years we have developed international human rights laws and standards, and have built elaborate international mechanisms for monitoring their implementation. But those developments were never intended as ends in themselves. They are merely partial, albeit crucial, elements of a greater protective system envisioned by the Charter of the United Nations. Recall these words from the Preamble to the Charter:

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
>
> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . .

It was no accident that the framers of the Charter followed their declaratory language on human rights with a clause calling for steps to be taken towards the establishment of conditions for the maintenance of the rule of law. The mere declaration of rights, their codification, and the monitoring of their implementation are not enough. Rather, the goal of universal respect for human rights requires the building of effective structures for the protection of those rights under the rule of law. Therein lies the wisdom of the Charter. Therein lies our mandate for the next phase of the human rights movement in Asia and the Pacific.

This is indeed a daunting challenge, and one which will require new and stronger commitment by all members of the Asian and Pacific community of nations. Commitment to multilateralism; to preventive action; and to enhanced regional cooperation in advancing the purposes and principles of the United Nations, including, as proclaimed in Article 1 of the Charter, the achievement of "international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

There are, of course, many lessons to be learned from the experiences of other regions, and Professor Reisman's paper will help us to examine those experiences. The options for this region are many, as illustrated by Professor Dias in his contribution. But whatever the path to be chosen, the nations of Asia and the Pacific may take heart that, assembled here in Kath-

mandu, their representatives are committed to building strong, effective and regionally appropriate mechanisms for the promotion and protection of human rights.

4. Supporting the strengthening of civil societies

A strong civil society, including adequately trained, equipped, financed and organized non-governmental human rights organizations, women's groups, labour unions and community organizations, is essential to sustainable development, democracy and human rights.

We must recommit ourselves to strengthening the capacity of such organizations to fulfil their legitimate and important role in generating a vigilant, continuous, informed and effective domestic demand for human rights and fundamental freedoms.

Across this region, committed, qualified and courageous Asian and Pacific human rights workers stand ready as a rich pool of national expertise and energy which must be fully harnessed to our common human rights purpose. These, Mr. Chairman, are the grass roots of human rights, without which efforts at the international, regional or governmental levels cannot succeed.

5. Establishing independent national institutions

Mr. Chairman, ladies and gentlemen, something remarkable is happening in Asia and the Pacific. A new regional trend is becoming evident which, I repeat today, my Office is committed to supporting, encouraging and celebrating with the nations which have associated themselves with this development. Independent national human rights institutions, as defined by the United Nations in the Paris Principles, have now been established, for example, in the Philippines, India, Palestine, Indonesia, Australia and New Zealand. Work is under way to set up such institutions here in Nepal, in Papua New Guinea and in other countries. These countries have joined this global trend because they, like us, are convinced of the important role that strong, independent, accessible andadequately resourced national human rights institutions can play in advancing the cause of human rights.

These institutions are domestic institutions, responding to the national realities of the countries they serve. Their focus on alternative dispute resolution, including through mediation and conciliation, makes them particularly appropriate to a range of cultural traditions. The less expensive, less formal, less complex procedures which characterize them serve the goal of

accessibility, among populations which might otherwise be left without access to effective redress. And their independence ensures the necessary confidence in those who seek recognition of their rights under national and international law.

The logic of establishing an independent institution which can serve as a sustained, domestic repository of human rights expertise is self-evident. Building national human rights capacity is, after all, a goal of every country in the region. For all these reasons, my Office, through the Centre for Human Rights, will continue, as a priority matter, to provide advice and assistance in the establishment and strengthening of national institutions, and in facilitating, across Asia and the Pacific and globally, cooperation between these institutions. The paper prepared by Mr. Burdekin of my Office looks more closely at these issues, and will certainly provide the basis for an interesting discussion.

6. Focusing on prevention

We are all familiar with the old truism that "an ounce of prevention is worth a pound of cure". Nowhere is this more true than in the field of human rights. We have seen time and time again that the international community can be effectively rallied to support relief efforts after a large-scale crisis. Donors and resources are mobilized, United Nations peace-keeping or monitoring operations are fielded, and international expertise and support pour into the war-torn, economically devastated or atrocity-scarred country.

I believe that in Asia and the Pacific, as in the rest of the world, preventive action through strong regional and national mechanisms is, in many respects, an investment. It is an investment in human rights and, as such, an investment in justice, in democracy, in development. It is an investment in peace. History is replete with evidence that large-scale violations of human rights and fundamental freedoms lead inevitably to conflict. Indeed, the seeds of conflict, though sown locally, can sprout dangerous branches, which reach over borders, spreading conflict in a pattern of escalation which becomes more intractable with every successive expansion. Thus, while monitoring and international efforts at resolution of conflict can address the phenomenon at its roots, other measures must be directed to an even earlier stage, to render infertile the ground in which the seeds of conflict are planted. This is the preventive mission of regional cooperation in the field of human rights.

The message, stated simply, is this: so much more can be gained, for so much less, if we act to address the root causes of conflict, and of massive human rights violations, before they reach their horrible and otherwise inevi-

table conclusion. One example of meaningful preventive action is technical cooperation. At this moment, in places across Asia and the Pacific, our technical cooperation programme is working, side by side with national Governments and NGOs, out of the flash of the cameras which accompany more high-profile peace-keeping and monitoring operations. We are currently implementing technical cooperation projects with, among others, Nepal, Kuwait, Bhutan, Cambodia, Mongolia, Papua New Guinea, China, Indonesia, Viet Nam and Palestine.

United Nations experts and staff are assisting in the organization of free and fair elections, in the establishment of domestic conflict-resolution mechanisms, in reforming constitutions and laws to bring them into conformity with international human rights standards. They are providing human rights training and advice to judges, prosecutors, police and prison officials. They are securing resources for the functioning of independent judiciaries. They are working with members of the armed forces, to introduce human rights and humanitarian law standards into military policy and military training regimes. They are helping to build strong, organized civil societies, through support for NGOs, the independent mass media, women's organizations and trade unions. They are engaged, in short, in the building of national infrastructures for the promotion and protection of human rights under the rule of law.

Their task is not an easy one. Their work is underpinned only by shoestring budgets, the integrity of the international standards on which their advice is based, and the good will and commitment of the Asian and Pacific peoples and Governments with whom they cooperate.

It is therefore imperative that the international community take up its preventive responsibilities with the same passion with which it reacts to human rights crises that have already manifested themselves. Support for programmes of prevention simply makes good sense. The choice is to pay a little now, or to pay much more later, in dollars, in lives and in human dignity.

Mr. Chairman, one cannot speak of prevention without mention of the role of education.

Long-term and vigilant human rights promotion and protection in the region cannot be successfully achieved from above. Rather, they must come from an informed and sustained domestic demand for human rights from the people—the subjects of human rights.

In December 1994, the General Assembly declared the period 1995 to 2004 the United Nations Decade for Human Rights Education. The proclamation of the Decade did not represent the birth of global efforts for human rights education, but rather their maturation. This development is the prod-

uct of hard-learned lessons for the community of nations, illustrating that the effective promotion and protection of human rights demand far more than a well-developed set of rules and the establishment of mechanisms to ensure their compliance. Rather, a meaningful struggle for human rights requires as well that those who have the potential to affect the realization of human rights, and everyone entitled to their enjoyment, be aware of both their rights and their responsibilities under this international framework.

In realization of this, ladies and gentlemen, we must give increased attention to human rights education in this region. The objective of human rights educational activities must be to teach the language of human rights to all people in the region; to make everyone fluent in its vocabulary; and to enable each person to translate its terms into his or her daily conduct—whether student or farmer, police officer or soldier, government official or ordinary citizen.

It is for the Governments and peoples of Asia and the Pacific to create the necessary human rights curricula, and each will be fundamental to the improvement of the human condition here. But whatever the approach or pedagogy, ladies and gentlemen, these will be nothing less than lessons for life, teaching respect for the sanctity of human life, and therefore of human dignity; guiding human conduct in everyday life, at the office, in prisons, in the fields and in schools; and applying, from the first day of life to the last, simple and substantive formulas: protect our children; develop our youth; empower our adults; and elevate our seniors.

Our task—yours and mine—during the next 10 years will be to bring these lessons for life to the entire region—not just to the lawyers and the politicians; not only in the classroom and the conference room; but to all people, everywhere.

This will require new creative approaches, regionally relevant methodologies and regionally appropriate mechanisms. It will require a sustained commitment on the part of actors at all levels of organized Asian and Pacific society—local, national and regional. Most of all, I believe, it will require the fostering of an Asian and Pacific-wide realization that education is, in the first instance, a crucial, enduring and long-term contribution to preventing human rights abuses.

Mr. Chairman, Excellencies, ladies and gentlemen,

The universality of human rights, symmetry in their interpretation and cooperation in their implementation, with support from strong civil societies and independent national institutions—and, always, with a focus on preven-

tion: this is the vision which has brought us all here today and which must be the inspiration for our work. The Governments of this region must aim for nothing less. Our sisters and brothers in all Asian and Pacific nations deserve nothing less. And, together, you and I must accept nothing less in fulfilling our shared responsibility to bring the full realization of human rights, democracy and development to this great region of our planet.

I thank you, and I wish you success in your deliberations.

VII. WORKSHOP CONCLUSIONS

1. The Kathmandu workshop, taking note of the positive role that regional arrangements could play in the promotion and protection of human rights, examined the experiences in other regions where such arrangements exist and studied the possibilities and limitations emerging from such experiences. The workshop discussed common principles and explored enabling strategies and building blocks for the establishment of a regional arrangement in the Asian and Pacific region.

2. The workshop welcomed the participation, for the first time, of delegates from West Asia and recognized the need to ensure that issues, concerns and priorities of West Asia were effectively addressed at future workshops.

3. The Kathmandu workshop was able to build upon the common understandings, agreements and achievements of the three previous regional workshops, held in Manila (1990), Jakarta (1993) and Seoul (1994), particularly with respect to timely dissemination of human rights information to both Governments and non-governmental organizations.

4. It was felt that the diversities and complexities of the region would require the process of establishing a regional arrangement to involve extensive consultations among countries in the region in order to arrive at consensus. However, the workshop stressed the importance of initiating such a process on a step-by-step basis, with the sharing of information and experiences and the building up of national capacities for the promotion and protection of human rights to help accelerate the process towards a regional arrangement. Specific steps that could serve as confidence-building measures were needed.

5. While the experiences of other regions would continue to be carefully examined, it was clear that any regional arrangement for the Asian and Pacific region would need to be based on the needs, priorities and conditions prevailing in the region. It was vital, therefore, that the rationale for any regional arrangement in the Asian and Pacific region should emerge from within. It was on the basis of the needs and priorities of the region that the case for yet another human rights mechanism such as a regional arrangement rested. Accordingly, the roles, functions and tasks of a regional arrangement

in the Asian and Pacific region should be identified by the Governments in the region, which would develop consensus as to what the outcomes and achievements of a regional arrangement would be. A series of consultative arrangements with promotional mandates for information and education would serve as building blocks towards a regional arrangement.

Steps for regional cooperation

6. The Kathmandu workshop was convened pursuant to Commission on Human Rights resolution 1995/48 of 3 March 1995, entitled "Regional arrangements for the promotion and protection of human rights in the Asian and Pacific region", in which the Commission invited States in the Asian and Pacific region to undertake actions for the establishment of a regional arrangement for the promotion and protection of human rights. There was agreement that the step-by-step process towards the establishment of a regional arrangement should include the steps described below.

(*a*) The workshop recognized the importance of human rights education for both the promotion and the protection of human rights, as well as the development of national programmes on human rights education, including in the context of the United Nations Decade for Human Rights Education, and the sharing of experiences in the region regarding such programmes.

(*b*) The workshop reaffirmed the call by the World Conference on Human Rights in Vienna for the wider ratification by States of human rights instruments and reiterated that primary responsibility for the promotion and protection of human rights rested with the State.

(*c*) The workshop supported the development of national action plans on human rights, as proposed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, whereby States identify the steps by which they will improve the promotion and protection of human rights at the national level.

(*d*) The workshop reaffirmed the resolutions of the General Assembly and the Commission on Human Rights relating to national institutions for the promotion and protection of human rights (including resolution 1995/50, adopted by the Commission since the third workshop). In this regard, the workshop reaffirmed the principle contained in the Vienna Declaration and Programme of Action that it is the right of each State to choose the framework which is best suited to its particular needs at the national level. The workshop further reaffirmed that the development of national institutions should be in accordance with national legislation and the principles annexed to General Assembly resolution 48/134 of 20 December 1993. The workshop also recognized that the United Nations had played and should con-

tinue to play an important role in assisting the establishment and development of national institutions.

(*e*) The workshop welcomed the decision announced recently by several Asian and Pacific States to establish or consider establishing independent national institutions for the promotion and protection of human rights and encouraged all Member States in the region to take appropriate steps to facilitate bilateral and regional cooperation, including between national institutions, for the exchange of information and experience concerning the establishment and operation of such institutions. The workshop also encouraged States where national institutions for the promotion and protection of human rights already exist to strengthen those institutions, as outlined in the Vienna Declaration and Programme of Action, and, where appropriate, to incorporate those elements in national development plans or in their preparation of national action plans.

(*f*) The workshop noted the decision taken by national institutions at their April 1995 meeting in Manila to encourage Member States in the Asian and Pacific region to establish appropriate regional human rights arrangements and, specifically, more extensive cooperation between existing national institutions in the region through bilateral and regional consultations, staff exchanges, regional conferences, joint projects and other appropriate programmes.

(*g*) The workshop welcomed all useful and positive roles played by non-governmental organizations (NGOs) in the promotion and protection of human rights, as well as their constructive participation in the process of the development of regional arrangements.

Other issues discussed at the workshop

7. The workshop also discussed the following issues: regional cooperation on shared problems; the interrelationships between development, human rights and democracy; obstacles to the realization of the right to development; the question of the rationalization of existing human rights mechanisms; and the possible development of human rights arrangements on promotional activities within existing regional and subregional organizations, where appropriate.

8. The workshop recognized the importance of the development of regional cooperation for the strengthening of national capacities in the field of human rights, including the strengthening of national legislative capacities.

Planning for the next workshop

9. The workshop concluded that it would be useful to create an open-ended team comprised of representatives of interested Governments in the region and the Centre for Human Rights. The team would consult with NGOs and national institutions to ensure the effective preparation of the next workshop and to facilitate the development of a regional arrangement.

VIII. WORKSHOP PAPERS

Establishment of a regional human rights arrangement in the Asian and Pacific region: experiences of other regions

by

MICHAEL REISMAN*

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I. Introduction

1. One of the working assumptions of this workshop is that international human rights instruments that set explicit standards for Governments with respect to how they must treat those subject to their jurisdiction and control are useful, if not indispensable, techniques in contemporary international politics. A necessary corollary to that assumption is that these instruments must somehow be made at least minimally effective. There is a wide range of international techniques for doing this: reporting, monitoring, inter-State complaints, individual petitions resulting in recommendations, adjudications resulting in binding decisions, etc. Because the central international human rights instrument—the International Covenant on Civil and Political Rights—already incorporates some of these techniques, a preliminary question is whether the international community needs additional, regional bodies to oversee implementation.

II. Do we need more regional and functional bodies?

2. The creation of additional bodies is not without significant costs, and the funds available for international activities are limited. Yet there is a tendency to assume that we should create international bodies as a valued end in itself. In many areas of our civilization, we measure progress in terms of quantitative increases; hence international bureaucracies are pressed to validate themselves and their budgets by generating more papers, more conferences, more rules and more subordinate bodies. Add to that the imperative of capitalism, now the dominant global ideology, and what Elias Canetti called its "frenzy of increase", and it becomes timely to step back and ask about the prospect of creating and then having to continue to pay for more and more human rights institutions. For, ultimately, this is in large part a cost-benefit question. Courts are nice, of course, and allow more lawyers to become judges; but because public resources are finite, each prospective new institution will preclude the financing and performance of some other urgent community task. So each new institution must justify itself competitively.

3. Is there a danger of "proliferation"? Will more regional bodies needlessly increase transaction costs with few corresponding gains for human rights or whatever other social values are at stake? Will the many new and diverse voices of authority prove to be inconsistent on critical issues and ultimately undermine the essential clarifying and educational function of legal decision? Will the proliferation of institutions transform the lingua franca of international law into a regionalized babel? Will the financial burden be too heavy and will costs exceed benefits?

4. In the human rights field, there is already some congestion. Regional, functional and general international bodies often supervise the same prescriptions, often with very similar procedures. For example, many of the intergovernmental bodies impose heavy reporting requirements. There is a considerable overlap in the information that Governments have to supply to the bodies. If more human rights conventions with intergovernmental expert committees are created and follow the technique of imposing reporting requirements for country studies, the transaction costs for States will increase without any apparent corresponding gains in human rights.

5. This particular problem could be addressed by establishing a system of consolidated reports, i.e. by agreeing on a single heuristic that would guide the preparation by each Government of only one report which would then be submitted to, let us say, 20 intergovernmental organizations. The regime of the International Covenant on Economic, Social and Cultural Rights allows for this sort of consolidation. Applied more generally, consolidation could save some costs, but impose others. One important element that could be lost would be the latent function of reporting. The manifest function of reporting is the gathering of information pertinent to the instrument in question. The latent function is the interaction of international and government officials over an extended period as data are organized and defended and internal adjustments are made in anticipation of and to avert or obviate external criticism. In addition, a single comprehensive report would surrender the very focused and detailed material that is the *raison d'être* of functionally specific organizations.

6. The problem of costly proliferation could also be addressed by simply dispensing with reporting requirements. Unfortunately, relatively few other enforcement strategies are available to intergovernmental bodies. Moreover, reporting still seems to be one obligation that Governments find easier to accept, either generally or as a first tentative step into participation in the international human rights programme. Thus what appears to be congestion in this sector may actually constitute a rational response—perhaps the only one available at the moment.

7. There are also apparent redundancies with regard to jurisdiction to hear individual petitions. Several different intergovernmental bodies may be competent to entertain the same petition. When I was a member of the Inter-American Commission on Human Rights and lobbied for adherence to the American Convention on Human Rights, government officials in smaller States sometimes said to me: "We are party to the Covenant on Civil and Political Rights. Why do we need to adhere to the American Convention too?" The question was quite cogent. Most of the substantive norms in the two instruments are identical or congruent and many of the procedures are similar.

8. To deal with overlapping jurisdictions, many bodies have already developed doctrines of *lis alibi pendens* to avoid duplication of procedures in specific cases. These measures avoid manifest duplication of procedures in individual cases, but they do not ease the burden on smaller States that being parties to more than one instrument imposes. Their foreign offices still must assign often very scarce resources to monitor patterns and developments in lawmaking and law-applying in each of the different bodies to which they have subjected themselves. The legal departments of many foreign offices consist of two or three people, some of whom may be part-timers with outside law practices.

9. Do the government officials, who ultimately have to bear the costs of this type of proliferation, have a point? Why not consolidate human rights adjudicatory and quasi-adjudicatory bodies? It has been accomplished successfully in cognate fields. The International Labour Organisation's Administrative Tribunal serves many other intergovernmental organizations, and the jurisdiction of the International War Crimes Tribunal for the former Yugoslavia was extended to events in Rwanda rather than creating a new tribunal. Perhaps the international community should be moving from proliferation to consolidation. Or should it?

10. Redundancy is a pejorative term, implying an uneconomic if not profligate expenditure of resources caused by apparently unnecessary duplication of functions. Nevertheless, many redundancies in biological and social life are actually systemically beneficial. Redundancy may sometimes provide an evolutionary advantage that tips the balance in favour of species survival. Here, as elsewhere, one must examine context and the aggregate consequences of alternatives before dismissing a practice as redundant.

11. Two patterns of redundancy present themselves in human rights decision mechanisms. One is caused by additional regional and subregional arrangements, and the other by creating new bodies that are given functional specifications over normative formulations at a much higher level of generality than have already been assigned to universal or regional bodies. Let us consider each briefly.

12. Regional and subregional arrangements, like the Inter-American Commission, may offer some advantages by increasing participation in the international human rights system. Some Governments, reluctant to sign on to a universal system, may be more willing to participate in a system in which Governments similar to them and located in their "neighbourhood" are engaged. If the region or subregion is characterized by common cultural values, then these arrangements may provide additional reassurance that a Government's problems will be understood sympathetically and in a frame of reference in which its officials are fluent. Sometimes, however, inter-élite

sympathy and understanding may undermine the effectiveness of a human rights instrument. Relative ease in transportation and communication may facilitate the operation of the regional or subregional system, especially for individual petitioners and their counsel. On the other hand, we are familiar with the informal "doctrine of the limitrophic State", under which "limitrophic" States avoid criticizing each other.

13. If there are advantages to the creation of regional adjudicatory bodies alongside the universal ones, there are also dangers. We must be wary of certain subregional groups pressing for the lowering of international norms as a means of forwarding the entrenched interests of dominant élites. A regional organization in this sort of context may not serve all the major purposes of the system and may instead erode the clarity of international norms. On the other hand, this type of regionalization does promise some, possibly significant, human rights consciousness-raising and, perhaps, some compliance.

14. You will note that the problem here is not the addition of a new entity or proliferation as such, but how to integrate the potentially beneficial new entity into the international human rights system in ways that make it contribute to, rather than detract from, the larger purposes of the system. One way of dealing with this latter problem might be by insisting that regional arrangements, to be legitimate, must be "licensed" or "franchised" or, to use the Security Council's current term, "subcontracted" by a universal human rights organization, subject to two conditions:

(*a*) that the regional body comply fully with international *jus cogens*, those peremptory international human rights norms from which no derogation is permissible;

(*b*) that the regional body accept the competence of some sort of superior instance, a "super-tribunal", if you will, a universal court competent to issue advisory opinions *motu proprio* when it feels that, even allowing for margins of appreciation, normatively unacceptable inconsistencies have arisen in the interpretations of universal norms by the licensed regional bodies, or departures from the proper international standard.

15. Subcontracting is not without its risks, especially when the regional or subregional system was inspired by rejection of some international norms and the desire to create an institutional defence against them. Whether delinquent States would feel under as much pressure to comply with these "appellate" opinions, after having been vindicated by their regional bodies, is doubtful.

16. We have already considered functional specification bodies. Functional specification bodies are intergovernmental arrangements that

have been created to deal only and more intensively with one part of the human rights programme that is already covered by a universal or regional body. The prohibition of torture, or the protection of the rights of children or the rights of women, are all certainly included in the jurisdiction of general international and regional human rights organizations. Why, then, create new organizations of functional specificity? Are they redundancies, causing congestion and imposing unnecessary expense?

17. Here again, the answer is not simple and turns on context. Where there are widespread or deeply rooted practices that violate specific international rights, there may be a short-term justification for a specialized body, operating on the basis of a distinct convention, which deals only with a particular pathology. Where the offensive practices are endemic to certain sectors, for example prisons, and an appropriate level of attention to them would tax the resources of a general-jurisdiction human rights organization, there may be a justification for a permanent functionally specialized entity. Such entities will be redundancies only if their functions could have been performed just as effectively by working groups within a general-jurisdiction human rights organization. Ultimately, however, a calculation of costs and benefits for human rights issues will depend on the degree of commitment of a community to human rights. Some communities may believe that any price is acceptable to prevent or correct a human rights violation. Other communities may believe that such a standard, while admirable, is beyond their means.

III. Regional experiences

18. I propose to examine the genesis, conditioning factors and performance of three regional human rights institutions: the European system, the inter-American system and the African system.

A. The European system

Background to the development of a European human rights mechanism

19. A number of conditioning factors contributed to the formation of the regional human rights mechanism in Europe. The distinctive language of human rights had already entered the international political vocabulary, thanks to the Atlantic Charter and many statements made by Allied leaders during the Second World War. The Universal Declaration of Human Rights had already been adopted by the United Nations General Assembly. But the development of a regional human rights system in Europe was, in critical ways, a response to the genocidal horrors of the war. The post-mortem by

élites and scholars concluded, in part, that disrespect for the rule of law and fundamental individual rights was a transnational destabilizing force with a potentially strong regional reach. Post-war European leaders promoted the creation of a European human rights system as a way of checking at an early stage the growth of regimes that based their rule on violations of individual rights.

20. The East-West conflict also influenced the development of a European regional system. European leaders seeking to form a cohesive policy stance against the Communist bloc saw the commitment to human rights as a desirable value for the community of nations that they were creating. The movement for European integration and unity in the second half of this century, which was influenced by other factors, added to the pressure for the establishment of a comprehensive, participatory and effective regional human rights system. A common code of human rights could serve as a shared dialect for communication in an otherwise economically, and often politically, diverse region. The creation of effective intergovernmental and supranational institutions, such as the Committee of Ministers and the European Parliament, legitimated at the domestic level the transfer of domestic resources to regional human rights institutions. Thus a variety of concerns and interests brought European national élites to the view that their individual and common interests would be served by some form of regional human rights system. But there was considerably less agreement as to what that form should be; some of the more insistent pressure came from below, from democratic institutions that the European movement had already formed.

21. In 1948, at the Congress of Europe, Winston Churchill called for a European charter of human rights. In 1949, article 3 of the Statute of the Council of Europe made maintenance and further realization of human rights and fundamental freedoms a condition of membership. The Council of Europe became the forum in which most of the discussions leading to the creation of European human rights instruments took place.

22. In 1949, the Consultative Assembly of the Council of Europe, now the Parliamentary Assembly, decided to address the creation of regional human rights instruments after the Committee of Ministers of the Council had refused to put it on the agenda for the first year. Drawing on a draft convention produced earlier in the year by the International Juridical Section of the European Movement, the Assembly delegated to its Committee on Legal and Administrative Questions the drafting of what became recommendation 38 of the draft European Convention on Human Rights.

23. The draft rejected positive social and economic rights in favour of limited civil and political rights of the type found in English common law and the American Bill of Rights. The draft listed 12 rights, without defini-

tion, and cross-referenced them to the Universal Declaration of Human Rights. As a collective guarantee, the draft suggested binding commitments from the parties. For enforcement, the draft suggested the creation of a European Commission of Human Rights and a European Court of Human Rights.

24. In evaluating this recommendation, the Committee of Ministers appointed its own Committee of Experts. This Committee of Experts could not decide whether to enumerate rights broadly or to define specifically protected rights, whether a European Court of Human Rights should be created, and whether individuals should be given standing to bring petitions. To resolve these political questions, the Ministers, in June 1950, appointed a Committee of Senior Officials, who chose to define rights in detail according to the guidelines of the United Nations Commission on Human Rights. They favoured the creation of a court, but only through a compromise that limited jurisdiction to those parties which separately declared that they accepted it and with a minimum of nine parties required. The Ministers adopted these suggestions in August 1950 and also reached a compromise as to the right to individual petition. The right was to exist with respect to the Commission, but only for States parties that accepted, in a separate declaration, that individuals should have standing. The Ministers then sent back the amended draft to the Assembly. The Assembly added the preamble and insisted that the rights of property, education and free elections be included. The Ministers adopted the preamble, but did not incorporate the additional rights that the Assembly had requested, apparently because of differing stances, within the Committee of Ministers, on nationalization and the role of religious organizations in education. Finally, in November 1950, the parties signed the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

Supplementary lawmaking

25. At the bureaucratic level, the lawmaking process leading to the adoption of the European Convention was thus complex and quite unique. At one level, a division of labour emerged between political and technical-legal bodies as the Ministers and the Assembly respectively delegated to their Committee of Experts and Legal Committee most of the non-controversial drafting. At another level, the Ministers seemed to be more susceptible to the claims of minimalists such as the United Kingdom and the Scandinavian countries, which favoured less institutionalization, and the Assembly to the claims of maximalists such as France and the Benelux countries. The system of accommodation that emerged accelerated the drafting of relatively non-controversial parts of the Convention and avoided political confrontation regarding the more controversial provisions, or the so-called political questions.

26. At the same time as the Convention was adopted, an amendment system came into place with the optional First Protocol, which added the three rights that had been left out by the Ministers but supported by the Assembly. The Convention came into force in 1953; the First Protocol in 1954. Declarations accepting the right of individual petition came more slowly: the requisite six were not secured until 1955. Acceptance of compulsory jurisdiction for the European Court of Human Rights was the slowest to come: the required number was reached in 1958. The Court came into being in 1959.

27. The protocol system has been used to add rights to the Convention or implement new procedural rules in an incremental, optional fashion. Although the protocols are separately negotiated treaties, the Council of Europe has proved to be an effective institution for drafting them. The Council has submitted a total of 10 protocols, eight of which have been ratified by the parties. In May 1963, the Second Protocol granted the European Court of Human Rights the power to give advisory opinions. The Third Protocol, also of 1963, scrapped a system of subcommissions in the original Convention, which had required that the European Commission of Human Rights first assemble a fact-finding subcommission of seven members with a duty to seek a settlement and, only when failing in this effort, to submit the case to the European Court of Human Rights. The same year, the Ministers' Committee of Experts drafted the Fourth Protocol, which, initiated by a recommendation from the Assembly, added rights not included in the Convention or the First Protocol, such as freedom from imprisonment for civil debt, freedom of movement, the right to enter one's country and not be expelled, and the prohibition of collective expulsion of aliens. Later that year, the Fifth Protocol modified the European Commission's and the European Court's election system to allow the entry of the new members of the Council of Europe to be taken into account for the triennial system. The Sixth Protocol, adopted in 1983 and ratified by more than half the member States, is a commitment to abolish the death penalty in time of peace. The Seventh Protocol, a response adopted in 1984 to the International Covenants on Human Rights, incorporates those rights which the Committee of Experts found could be stated in sufficiently specific terms to be enforced effectively under the system. Self-determination, for example, was apparently left out because it was too broad in this regard. The Eighth Protocol, adopted in 1985, created a system of chambers for the Commission devised to handle an increasing case-load. The Ninth Protocol, adopted in 1990, revisits the issue of an individual's standing before the Court. It overrides the declaration procedure and replaces it with pre-screened individual standing that will become effective for all parties once 10 States have submitted their ratifications. The Tenth Protocol, adopted in 1992, modifies a two-thirds majority to a simple majority for cases that the Commission does not bring to the Court but reports to the Committee of Ministers, so as to avoid non-decisions.

28. The system of supplementary protocols has allowed for the development of an effective system of lawmaking.

Operational aspects

29. Under the European Convention on Human Rights, three bodies are mainly responsible for enforcement: the European Commission of Human Rights, the Committee of Ministers of the Council of Europe, and the European Court of Human Rights. The responsibilities of these bodies have remained relatively unchanged over time.

30. The Commission is formed of as many members as there are parties to the Convention. Members of the Commission are, at least formally, independent and not delegates of any country. Under article 24 of the Convention, a State party may refer a case against another State party to the Commission. An individual may request a hearing from the Commission if the defendant country has signed a declaration under article 25 allowing such standing. Under the Ninth Protocol, such a declaration would not be necessary. Individual standing has proved to be important because 1,000 times more individual cases than inter-State claims had been filed as of 1993.

31. The tasks of the Commission can be divided into three types: determining admissibility, fact-finding and resolving disputes. In considering a claim's admissibility under the Convention, the Commission examines whether domestic remedies have been exhausted and whether other, more broadly phrased suitability requirements specified in the Convention have been met. After finding a claim admissible, the Commission conducts a fact-finding examination of the application through a judicial-type hearing. In doing so, the Commission has the power to require that the investigated State furnish all necessary information. The Commission has a duty to seek a settlement and often achieves one. The ratio of reports to friendly settlements among admissible claims was 4:1 in 1991. If settlement is reached, the Commission issues a brief report on the facts and the solution achieved. If no settlement is reached, the Commission issues a detailed report setting out the facts, describing its opinion as to the violation and discussing proposals for solution. This report is transmitted to the Committee of Ministers. The Committee of Ministers is formed by the Ministers of Foreign Affairs of member countries of the Council of Europe. The Committee, in its enforcement functions, evaluates and reports on cases transmitted by the Commission and decides by a two-thirds majority whether violation has occurred. As mentioned above, the Tenth Protocol to the Convention proposes to change the latter decision-making rule to a simple majority, when ratified.

32. The Committee of Ministers has no power to grant specific remedies. Nevertheless, the Ministers may order publication of a Commission report on violations and may, although this is unlikely, expel a State from the Council of Europe for violation of article 3 of its Statute requiring observance of human rights.

33. The European Court of Human Rights consists of as many judges as there are members of the Council of Europe. The judges act independently of any State. A defendant State must accept jurisdiction either by declaration or ad hoc. Cases must be referred either by the Commission or by another State, so long as they arise under the Convention. The standing of individuals is recognized only through a declaration of the defendant State, but the Ninth Protocol will amend that requirement if ratified.

B. The inter-American system

34. The inter-American human rights system, which is comprised of the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the political organs of the Organization of American States, is not widely known outside its hemisphere. It has not been as efficient, in many ways, as the European regional system, although it should be noted that its mandate is broader. The challenges that the inter-American system has faced have been especially daunting and make its accomplishments all the more impressive.

35. The regional system comprises 34 countries in North, Central and South America and the Caribbean with a population of more than 600 million. Four languages in this region are officially recognized by the Organization of American States, but there are many other indigenous and ancient languages spoken by tens of millions of people, as well as new languages, such as Creole in Haiti, which have taken shape and generated rich cultures since the time of Columbus. In contrast to Western Europe, in which the Roman civilization was to some extent the common cradle for most of the legal cultures that have developed, the western hemisphere includes Continental and Continental-colonial approaches to law, English-colonial approaches in many of the Caribbean States, the Westminster model in Canada, and the United States' distinctive constitutional experience. The major religions in the hemisphere are the product of the struggles of the Christian Reformation, but the hemisphere has provided fertile soil for African religions that were transplanted, and has also generated new religions.

36. Development in the Americas varies widely from subsistence economies to the most advanced industrial and science-based economies. The distribution of wealth ranges from some of the poorest economic sectors in the world to some of the richest. The degree of social stability found

varies from countries that are suffering severe civil strife, to countries in which constitutional remissions of political power are infrequent and power is often transferred by coup, to highly stable democracies, some of which, particularly in the Caribbean, should serve as a world standard for the conduct of elections. In parts of the Americas, however, terrorism, whether politically motivated or an aspect of narcotics trafficking, is a recurrent feature. Narcotics criminal organizations figure in terrifyingly large ways in many of the domestic political systems.

37. Geographically, the Americas stretch from Tierra del Fuego in the Southern Cone to the Arctic Circle and from the Pacific to the Atlantic and throughout the Caribbean.

38. It was not easy to set up a regional human rights system at the intersection of so many axes of diversity. But it was done, and although the system is still evolving and undergoes periodic crises, it is now recognized throughout the hemisphere as an important part of the common political civilization and, in many places, a critical strut of national constitutional Governments.

39. The Organization of American States (OAS) was among the pioneers of modern human rights law. The OAS Charter of 1948 incorporates the "fundamental rights of the individual" as one of the Organization's founding principles. The American Declaration of the Rights and Duties of Man, prepared by the Inter-American Juridical Committee in 1947, was adopted by OAS in Bogotá the following year to elaborate upon the Charter's general commitment to human rights.

40. The Inter-American Commission on Human Rights, the mechanism for overseeing national implementation of human rights commitments, was created in 1959. Composed of seven members, elected in their individual capacity, the Commission started operating in 1960 with a rather vague mandate. In 1965, its competence was expanded to accept communications, request information from Governments and make recommendations "with the objective of bringing about more effective observance of human rights". In 1967, the OAS Charter was amended and the Commission became a principal organ of the organization. The American Convention of Human Rights, adopted in 1969, incorporated the Commission and assigned it specific competences. The Convention also created the Inter-American Court on Human Rights. The Convention entered into force in 1978. Currently, there are 25 parties to the Convention. Initial adherences were very slow. A critical factor in accelerating the process was the interest that United States President Jimmy Carter took in the matter and the pressure he was willing to exert on other heads of State. The pace of adherences leaped during the Carter administration.

41. The Commission has three forms of jurisdiction. Its *conventional jurisdiction* applies to the 25 States that have, to date, become parties to the American Convention. Its *judicial invocatory jurisdiction*, i.e. its competence to invoke the Inter-American Court, applies to the States parties to the American Convention that have declared that they accept the Court's jurisdiction. While these two forms of jurisdiction depend on adherence to the American Convention, the Commission's *declaration jurisdiction* applies to all parties to the OAS Charter—indeed, to all States in the Americas. Hence every independent State in the hemisphere, even those which have not yet become parties to the Convention, is subject, in some form, to the Commission's jurisdiction.

42. The Commission's jurisdiction may be invoked by citizens and organizations within the hemisphere. On its own initiative, the Commission may also prepare country reports. To facilitate both of these activities, the Commission conducts visits to the country concerned. The Commission also plays a role in regional codification and progressive development. It has drafted a number of important human rights instruments for OAS, it provides technical assistance to States parties in matters concerning the Convention, and it litigates cases before the American Court.

43. Human rights are about individuals, so it should be no surprise that a substantial part of the daily work of the Commission stems from individual petitions. Article 44 of the Convention states:

> Any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

44. A case begins on receipt of a petition about an alleged violation of human rights. Petitions about the same event often come from a number of different sources. The Commission examines the petition in terms of the basic requirements of articles 46 and 47 of the Convention—whether it contains names and signatures, whether it states facts that tend to establish a violation of the Convention or whether it is manifestly groundless, whether domestic remedies have been exhausted, whether the petition has been lodged within the specified time limits, whether it is pending in another international proceeding or has already been before the Commission.

45. If the petition does not fail these threshold tests, it is relayed to the Government it names with a request for information and its views. The information that is supplied may lay the matter to rest, in which case article 48, paragraph 1 (*b*), instructs the Commission to order that the record be closed. The information provided may also establish that the petition is inadmissible, which also terminates the procedure. If not, the Commission, with the knowledge of the parties, must proceed to investigate the matter, asking

for information that it deems necessary, hearing oral arguments and receiving written statements. It also puts itself at the disposal of the parties with a view to reaching a friendly settlement.

46. If a friendly settlement can be arranged, the Commission issues a short report to that effect to the Secretary-General of OAS. If there is no settlement, the Commission draws up a report with the facts and its conclusions and recommendations and sends it only to the State concerned, which may not publicize it. If, within three months, the matter has not been settled, the Commission has two options. It must either issue a final report, which becomes part of its annual report to the OAS General Assembly, or, for those States that have accepted the jurisdiction of the Court, it may refer the matter to the Court.

47. In addition to dealing with petitions, the Commission must stay abreast of general trends in order to perform the various functions prescribed by article 41 of the Convention. It accomplishes this by using a wide-ranging methodology: in addition to its scrutiny of all relevant documents, the Commission devotes a great deal of its efforts to meeting with numerous government officials, representatives of non-governmental human rights organizations and citizens from all walks of life. This methodology is important, since article 41 also specifies as a function of the Commission that it is to prepare "such studies or reports as it considers advisable".

48. One form of report is a country report. As the annual report explains:

> Under its mandate to promote the observance and defence of human rights, the Commission has been reviewing the status of human rights in the countries of the hemisphere and has drawn up special reports on some of them. These reports have been prepared on the Commission's own initiative, or upon instructions from an organ of the Organization of American States, and in some cases at the spontaneous request of the country concerned.

49. A country report examines the overall human rights situation in the country concerned and, where appropriate, makes recommendations to the Government. Every application of a legal instrument requires interpretation and judgement, and Governments do not always agree with all the conclusions that the Commission may have reached in country reports. Nevertheless, many Governments have accepted the reports in a positive way and have entered into a dialogue with the Commission about ways of dealing with the problems indicated, of which—one might add—elements of the Government may have already been aware. A number of Governments have been critical of the Commission, feeling that they were being unfairly or arbitrarily singled out. In no case is a country report about a member State of OAS prepared without consultation with government officials and without giving opportunities to the Government to express its views on the issues in the report.

50. Sometimes, as a result of the methodology I have described above and other information received, the Commission finds that essentially the same discrepancies in applying the standards prescribed by the Convention are occurring in many countries. There are some human rights violations that are widespread, if not virtually universal. In some cases, they are the result of major political, moral or technological changes, to which national laws or institutional practices have not yet adapted themselves. If the Commission confronted such pathologies only through the petition procedures, case by case and country by country, remedies might be secured in the individual cases that were lodged, but the underlying factors which had precipitated the problem would continue, as would the broader pattern of abuses. Some of these problems call for fundamental institutional change, such as is contemplated in articles 2 and 41 (*b*) of the Convention. Moreover, it does not seem fair to single out in a country report only one of many countries engaged in a practice inconsistent with the Convention.

51. To deal with these types of problems, the Commission may prepare "studies", in the language of article 41 (*c*). Studies enable the Commission to see things in hemispheric perspective and to develop recommendations on a hemispheric scale. Currently, the Commission is studying the status of women in national legislation in the hemisphere and prison practices throughout the hemisphere; it is considering a study of the consequences for the rights set out in the Convention of large-scale migration, both inter-State and internal, which would follow on a recommendation that the Assembly made to the Commission on a cognate subject.

52. With responsibility for 34 countries and more than 600 million human beings, the Commission, with seven members, a staff of 10 lawyers, a secretarial staff of seven and an annual budget of less than $1.6 million, faces a daunting mandate. The Commission's tasks are rendered even more difficult by the social and economic heterogeneity of the Americas, the intermittent civil strife that still afflicts many countries, the terrorism and narcotics traffic that compound existing human rights problems, and the sporadic coups. Incidentally, the suspension of constitutional order has never meant a "time out", a suspension of the Commission's jurisdiction, for constitutional order itself is a requirement of the Convention, as well as a precondition for the fulfilment of many other rights set out therein. Indeed, on a few occasions, the Commission has played an important role in re-establishing constitutional order.

53. The Commission has not always been successful. However, it regularly examines its performance, carefully heeds OAS's annual review of its activities and studies responsible non-governmental appraisals. Moreover, the Commission closely follows jurisprudence and developments in international and other regional human rights systems. To facilitate cross-

fertilization, some of the Commission's staff have been loaned to other human rights institutions and the Commission hosts lawyers from elsewhere for short-term internships.

C. The African system

Political background

54. The idea of establishing a regional human rights system dates back to the African Conference on the Rule of Law, held in Lagos in 1961. A non-governmental organization, the International Commission of Jurists, invited all African States to study the possibility of adopting a regional human rights convention. During the late 1960s, the United Nations Commission on Human Rights repeatedly, but unsuccessfully, tried to mobilize interest in the region for the creation of an African mechanism. A seminar in Cairo in 1969, jointly sponsored by the United Nations and Egypt, expressed general support for an African human rights commission. The United Nations Secretariat produced a report on the seminar and sent it to the Organization of African Unity (OAU), but OAU largely ignored it.

55. In 1979, the Organization of African Unity, through its Assembly of Heads of State and Government, adopted a "Decision on human and peoples' rights in Africa", calling for the drafting of an African Charter on Human Rights, which would have an implementing body. Economic and social rights were to be included and the decision emphasized traditional goals of OAU and not necessarily those of the international human rights system. Drafters were also instructed to incorporate the principle of non-interference, the struggle against apartheid and racial discrimination, and other goals of the New International Economic Order.

56. Experts met in Dakar and prepared a draft, which was finalized in Banjul in 1981. The African Charter on Human and Peoples' Rights was adopted by OAU later that year. A simple majority of OAU membership had to ratify for the instrument to enter into force. That occurred in 1986.

57. While the European system was generated by common interests of the élites of many European States and the American system began to be adopted because of pressure by then President Carter, the political interests that led to the creation of the African Charter are more opaque. Professor Umozurike, the current Chairman of the African Commission on Human and Peoples' Rights, has expressed the view that massacres in Burundi in 1972 and 1973 and initiatives by President Carter persuaded African leaders that a charter was needed to vindicate perceptions abroad.

Structure of the African Charter

58. In many ways, the African Charter is consistent with its predecessors in Europe and the Americas. But in contrast to those instruments, it goes well beyond civil and political rights, covering economic, social and cultural rights as well as a number of collective or peoples' rights. And, like the American Declaration, the earliest effort of the inter-American system, the African Charter also explicitly lists duties. Scholarly literature has debated whether these innovations are justified by special regional experiences or cultural norms. The rather ambitious scope of many of the rights covered by the Charter puts pressure on the enforcement bodies and requires significant resources.

Operational aspects

59. The African Charter system has no court, but assigns oversight functions to the African Commission on Human and Peoples' Rights, which has 11 members, chosen by the heads of State and Government of OAU. Each member serves in his or her individual capacity for six years and no State may have more than one national on the Commission.

60. The Commission has three sets of responsibilities: promotional, investigative and advisory. Under its promotional mandate, the Commission conducts studies, organizes symposia, prepares studies on region-wide problems and assists Charter signatories in the drafting of national legislation directed at implementing the rights covered by the Charter. The Commission has held a few conferences to address this particular mandate, but in its first five years undertook no country studies.

61. A State may refer a case to the Commission for investigation if it considers that another State is violating its obligations under the Charter. The recognition of standing for individuals is a mandatory provision of the Charter. As in other regions, friendly settlement should be pursued, but article 47 of the Charter emphasizes negotiation even before the Commission is contacted. After a case is referred to the Commission, it must evaluate whether domestic remedies have been exhausted, whether the claim is timely, and whether it is anonymous or insulting. On admitting an application, the Commission must gather all relevant information, attempt a friendly solution and prepare a report on its fact-finding activities, which is sent to the State or States concerned and the Assembly of the OAU.

62. If the Commission considers that a State is causing serious or massive violations, it may undertake a country study of such "special cases" (art. 58). In situations where the violations do not constitute special

cases, however, the Commission has no function other than to attempt to settle or, failing that, to pass the matter on to the Assembly. The Assembly may assign the case to the Commission for reporting.

63. The Assembly may instruct the Commission to undertake studies and may order publication of these studies, but no evidence has been found of such reports. Although the Commission may issue recommendations in its reports on how to solve problems, the Assembly usually does not issue any.

64. Under article 45 of the Charter, the Commission seems to have the competence to issue advisory opinions, as it is explicitly responsible for interpreting the Charter.

65. The overall performance of the African Commission has not been effective. In its first five years, the Commission received more than 100 communications; apparently none was considered. During the same period, most States parties apparently failed to furnish their biennial reports on legislative compliance and those that did furnish reports did not meet the required standards. Last December, the Commission shied away from open condemnation of the execution of nine leaders of the Ogoni minority; the executions were denounced worldwide.

IV. Considerations for the design of a regional system of human rights

66. From this brief review of the genesis and operation of the three existing regional systems, we can distil some guidelines for deciding whether and how to design other regional human rights mechanisms.

Relevance of the factor of cultural diversity or "cultural relativity"

67. Some proponents of regional and subregional arrangements contend that human rights are culturally relative and that the establishment of a so-called or self-styled "universal" code amounts to cultural imperialism. Opponents of this view argue that the international community has established an international standard and that terms such as "cultural relativity" are simply euphemisms for violations of the international standard that bleed the international programme of its effectiveness. Much of the disagreement arises from a misunderstanding of the content and objectives of the international human rights programme. Consider the issue of religious and rectitude codes. Surely the most distinctive feature of our species is the compulsion to create and ascribe meaning and value to the immutable experiences of human existence: the trauma of birth, the discovery that the self is separate from others, the formation of gender and sexual identity, procreation, the

death of those one loves, one's own death. Each culture, in its unique context, shapes and fashions its experience to provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates through the vicissitudes of life. These are the inner worlds of the individual and they are sustained by codes of rectitude that have been established by the culture or religions in which the individual participates.

68. The notion of the "universality" of international human rights norms should not be confused with the rectitude codes of the cultures of the many groups and peoples of the world. The human rights code is, indeed, universal and transcultural in that it is a single code that aspires to prescribe a single standard of protection for specific activities and sectors of the individual's life. One of the protected sectors is the individual's rectitude code, or, more precisely, the right to act according to it. But the point that is frequently confused is that, although the international protection norms are uniform for all, the objects of protection—the particular rectitude codes in each culture—are and must be different. Heinrich Zimmer wrote:

> Truth appears differently in different lands and ages according to the living materials out of which its symbols are hewn. Concepts and words are symbols, just as visions, rituals and images are; so too are the manners and customs of daily life. Through all of these a transcendent reality is mirrored . . . Each civilization, every age, must bring forth its own.

69. Those realities are expressed in sets of signs and symbols and practices of varying elaboration which, together, constitute comprehensive systems of rectitude for the culture concerned. Within each particular cultural system, each person, in turn, refracts those signs and symbols through his or her own experiences. They become a key part of the self, its identity, its matrix for past and future, its metric for the appraisal of events—indeed, its validation.

70. The international human rights system is not concerned with securing a homogeneity of inner worlds in a kind of planetary lowest common denominator. Rather, it is concerned with protecting the integrity of those inner worlds, for these "cosmovisions" or "introcosms" are the central, vital part of the individuality of each of us. This is, to borrow Holmes's wonderful phrase, "where we live". Respect for the other requires, above all, respect for the other's inner world.

71. While many moral codes that are generally considered "superior" emphasize respect for the physical integrity of others, they show considerably less respect and less understanding—indeed, even less tolerance—for the inner worlds of others. Kumbale Narisimhah Nayak has written:

> People nurtured in any culture which claims the validity of its frame on the questionable basis of faith, belief or religion cannot escape the tyrannical assumption of the universal validity and superiority of their own culture and its frame. Through the prism of this subconscious

intracultural assumption, other cultures look inferior and absurd or at best similar to the domestic culture.

72. The historic and, in many ways, continuing clash between Christianity and Islam was based on the conviction of the adherents of each that theirs was the only valid inner world and that those who subscribed to others were simply infidels. The political expansion of Europe throughout the world, which began in the fifteenth century, was driven by a belief in the superiority and inevitability of the European Christian inner world and its mandate to obliterate competing worlds and replicate itself everywhere, as it was driven by greed and lust for power. The *mission civilisatrice*—the self-ordained mission to civilize the world—has always been a euphemism for the eradication, brutally if necessary, of the inner world of indigenous peoples and the imposition of another, supposedly superior and transcendent, identity. From the melting of sacred gold objects into coins in Mexico and Peru in the fifteenth century through the systematic desecration and destruction of temples and holy places in too many parts of the world today, some efforts to destroy inner worlds have been systematic and often effective.

73. With the belated attention that is now being given to the remnants of indigenous peoples and their cultures, a new legal perspective is developing. The draft United Nations declaration on the rights of indigenous peoples provides, in article 13:

> Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; ...
>
> ...

Article 14 provides:

> Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literature...
>
> ...

74. The function of the international human rights system as it pertains to an individual's inner world is not to homogenize it, but to protect it. In other words, much of the international human rights system is not against, but in favour of, cultural diversity. This has become explicit in the new special norms that are being prescribed for indigenous peoples. This is not to say that there are not and will not be clear cases in which national practices, rooted in culture, will violate the international standard. In those cases, the international standard will prevail. As I pointed out in a recent article:

> ... Because this [international] process and the policies it has generated to guide decision do not derive from the positive law of a single state, but seek to limit and guide the behavior of all

state elites, the arrangements that emerge between smaller groups and states should be less susceptible to the abuses that were characteristic of entirely nationalistic treatment of distinct minorities. In most general terms, the principles call for the protection of individual rights and ordain a network of claims for protection and opportunity that every person in the world is entitled to make against whoever—government or otherwise—exercises power over them. One of these claims is the right of association and group formation as an instrument for the fulfillment of personal rights. The rights of group formation and the tolerated authority of group elites over their members extend insofar as they are indispensable for the achievement of individual rights. They cannot be justified if their effect is to abridge or limit basic individual rights.[1]

75. The point of emphasis is that the notion of an inherent conflict between international human rights and cultural practices is incorrect. Thus there are compelling reasons to seek to design regional and subregional human rights mechanisms in so far as it can be shown that they are more likely to appreciate local cultural practices.

Settling on the nature of the instrument

76. Although our focus is on mechanisms, we must begin with the instrument that these mechanisms are to apply. Practical questions relate to (*a*) the nature of the instrument to be opened for signature; (*b*) the normative range of the instrument (or instruments); (*c*) the range of participation in it that is sought. The three questions are obviously linked.

77. A regional system may start up immediately with a treaty, or it may, as the international community and the American regional system did, commence with a declaration. Because a declaration is ostensibly non-binding, many more Governments may be willing to endorse it as a common "standard of achievement". In a heterogeneous regional community, such a standard can help to lay the basis for a common perspective. All law is, in a sense, a process of learning, and a declaration can also serve to accelerate that process by generating in the Governments of the region new officers and new departments that are henceforth responsible for "declaration affairs". On the other hand, precisely because a declaration is non-binding, the supervisory body that can be created along with it—if such a body is created—will have a considerably weaker mandate. The mandate can be strengthened indirectly by having the declaration serve as an authoritative interpretation of some general human rights commitment in a binding political document, as is the case with the American Declaration and the very general human rights commitments in the Charter of the Organization of American States. Nevertheless, to press this too far undermines the attrac-

[1] W. M. Reisman, "Autonomy, interdependence and responsibility", *The Yale Law Journal*, vol. 103, No. 2 (November 1993), pp. 415-416.

tion of the declaration option and deters States from accepting it. Law is not served by clever tricks.

78. Alternatively, the initial document may be a convention, as was the case with the European regional system. Plainly, such a convention,—a binding legal instrument with explicit obligations—is the real objective of a regional system. The advantage of a convention is that, because it is binding, the level of actual and symbolic commitment to the regional human rights system is higher. Precisely for that reason, there is likely to be a much lower initial subscription to the convention, though this can be affected by the normative range of the instrument in question, a practical question that is considered below.

79. The basic code of international human rights is to be found in a number of well-known instruments that can properly be called *jus cogens*, in that other purported human rights instruments cannot derogate from them. Not every component of the international code has to go immediately into a regional instrument. When the American Convention was adopted, it was a comprehensive human rights instrument, covering virtually everything in the international human rights code as it then existed. In contrast, the European Convention concentrated on a limited number of rights within the code because, apparently, those were all that the founding States felt that they could politically or institutionally undertake to implement, at that time, under an international supervisory regime. Hence the drafters opted to recognize political and religious diversity by building on the most common denominators. Thereafter, the normative range of the European Convention could be and was expanded by additional protocols and a European Social Charter (with its own separate mechanism) that extended into other areas of the international programme. This meant that, at least initially, proportionately more Europeans could sign on to their Convention than could their American counterparts sign on to theirs. In the case of Africa, the relationship between normative reach and rate of adherence is a less instructive indicator, for the African Charter expressed many cultural values to facilitate acceptance, while the enforcement mechanism was severely restricted.

80. There was another advantage to the strategy of limiting the initial reach of the European Convention. Precisely because the Europeans knew what they were undertaking, they could accept the supervisory mechanism with some equanimity. The American Declaration did not contemplate a corresponding oversight mechanism. I am not certain that most of the American States undertook that sort of investigation prior to ratifying the American Convention. This may have contributed to a certain surprise and even indignation when the mechanism they had created began to exercise its jurisdiction over them. In Africa, a general desire of the heads of State and Government that the African Commission have more restricted enforcemen

powers than its counterparts in Europe and the Americas pre-empted such a surprise, but severely limited the effectiveness of the regional system.

81. Diplomats seeking consensus often produce documents that represent the lowest common denominator. There is a temptation—and it is a dangerous one—to create a convention that significantly dilutes international human rights obligations in order to extend participatory range. There is also a temptation to turn a convention or a charter into a long list of rights, beyond those contained in the Universal Declaration or deemed to be *jus cogens*, which cannot be enforced. This could put the instrument in conflict with mandatory international standards and undermine, at the very moment of birth, the legitimacy of the entire regional system. In this respect, a declaration which reproduces the international code, but not in a binding instrument, along with a commission would appear preferable to a diluted convention or a charter loaded with unenforceable rights with a commission.

Nature of the instrument and range of participation

82. One may hypothesize that the more comprehensive—in terms of *jus cogens*—the normative range of the human rights instrument, the slower will be the pace of ratification or accession. Conversely, the more restricted or concentrated the normative range, the more rapid will be the pace of ratification or accession. This brings us to the third preliminary question: the range of participation that is targeted.

83. Human rights are universal, and the optimum regime covers all territorial communities or, in a regional context, all the States in the region. As a practical matter, one has to decide how broad or narrow participation should be at the outset. A narrow participation strategy of, say, five or six States, at approximately equal levels of development, creating an intergovernmental human rights mechanism as between themselves has the advantage of being able to go into operation quite quickly, but it has the disadvantage of not reaching precisely those communities from which many of the serious human rights grievances are likely to come. And the initial subscribers may not be representative of the region, thereby weakening the potential of a regional system for reinforcing regional ties. A broader participation strategy avoids these problems, but it may require a more restricted convention or a declaration, in other words either a limited normative range or an ambiguous obligatory character.

84. The sequencing of the inter-American system may be instructive in this regard for other regions. The system began, as explained above, with a declaration, which Governments generally are more willing to endorse. Nevertheless, over a period of time, declarations may acquire the force of

customary international law. This is what most scholars believe has occurred with the Universal Declaration of Human Rights. The American Declaration was followed several years later by the creation of a commission, whose powers were not precisely stated but whose general mandate was the Declaration. The Commission developed its information-gathering competences and was later explicitly incorporated into the American Convention.

85. The number of ratifications necessary for the entry into force of the Convention was set at a level low enough for the system to begin to operate even though there might be a substantial number of delaying States that were simply holding out.

86. Regions or subregions whose members are tentative about a human rights mechanism might thus commence with declarations that are not formally binding, and then, perhaps, create a reporting body. All law is, in part, a process of learning, and, through these relatively easy first steps, government officials can begin to learn how to operate in the international human rights system. Alternatively, members of a subregion might create a more ambitious institution with compulsory powers, but only for a limited number of norms. This is, as we have seen, how Western Europe began, thereafter adding additional norms in the form of protocols and, originally, requiring separate declarations for court jurisdiction and individual petitions.

87. This sort of evolutionary procedure has a number of advantages. It permits Governments to become accustomed to the idea of a regional system and gives the apparatus of each Government time to make the necessary adjustments. Hence the advantages, in some contexts, of a declaration of general principles, along with the creation of a supervisory mechanism, followed by the initiation of preparation of a narrow convention, with the expectation that there will be additional protocols added to it over time. On the other hand, the African experience may serve as a caveat. The African Charter has had limited symbolic participation and limited support from any State in the region.

Status of States not parties to the instrument

88. Since subscription to international instruments is often slow and uneven, one problem for designers of human rights instruments is how to make them maximally effective in the period prior to wide adherence. For all its limitations, the technique of the non-binding declaration can be useful in this regard. In the inter-American context, the Declaration jurisdiction has permitted the Commission to extend human rights supervision to States that have not yet ratified the Convention, addressing the rather common problem of incomplete accession to a human rights instrument. Happily, Govern-

ments in those States that have not yet ratified the Convention have generally accepted this jurisdiction. As a result, the Commission has effectively extended human rights oversight to the entire hemisphere. Even if States that have not yet ratified the Convention persist, the Commission's Declaration jurisdiction will necessarily continue to develop and the two types of jurisdiction—Convention and Declaration—could gradually become parallel and possibly converge, in substance and procedure.

SHOULD NON-STATE ACTORS BE SUBJECTED TO JURISDICTION?

89. The Inter-American Commission documents human rights violations by parties other than the State itself. While this innovation is controversial, some consider it one of the Commission's most important regional contributions to the international human rights movement. Groups and individuals that openly oppose a Government may commit human rights violations in areas which they control or briefly invade. Allowing these perpetrators to evade responsibility effectively places a potentially large number of victims outside the Convention's protection. If one views the regional human rights system as concerned with the protection of human rights, without regard to the status of the authors of violations, this result is intolerable. The inclusion of non-State actors as potential violators may encourage Governments that are encountering insurrection and find that part of their territory is effectively controlled by anti-Government forces to adhere to a regional system, for they need not fear that they will be held responsible for the human rights violations of the insurrectionists.

90. The Inter-American Commission has gone a step further, hoping that the law it applies will also attribute personal responsibility to individual actors who, under a cloak of State authority, commit human rights violations that are also deemed international crimes. In pleading Advisory Opinion 14 before the Inter-American Court, the Commission stated:

> . . . it is now settled international law that individuals can bear responsibility for their crimes if the crimes in question have been characterized as international crimes.
>
> One of the important functions of the Advisory Opinion mode of jurisdiction . . . is to clarify the law and the legal implications of parts of a convention . . . Specifically, the Commission asks . . . that with regard to those provisions of the Convention, violations of which general international law or particular international law which binds the parties to the Convention has decided are international crimes or crimes against humanity, the individual responsibility of the perpetrator will be engaged and a contrary national law will not constitute a defense.

91. The Inter-American Court responded affirmatively to the Commission's proposed interpretation of the Convention.

SHOULD LAW OTHER THAN THE INSTRUMENT IN QUESTION BE ADMISSIBLE OR OF MANDATORY APPLICATION?

92. No instrument can anticipate all the contingencies to which it will subsequently be applied. In human rights matters, in particular, claims may be submitted that are only partly covered by the instrument in question. Clauses authorizing consideration of other human rights instruments can be useful in this regard. Thanks to the American Convention, the Inter-American Commission can turn to other international instruments to which States parties to the Convention are parties. Article 29 of the Convention provides:

> No provision of this Convention shall be interpreted as:
>
> ...
>
> (*b*) Restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party;
>
> ...

93. In particular, the so-called humanitarian law instruments have provided the Commission with normative standards for dealing with human rights problems in armed conflict that plainly fall within the reach of the Convention but are not explicitly addressed therein.

SHOULD THERE BE "TIME OUTS" FOR PERIODS OF INSTABILITY?

94. Some argue that human rights can be implemented only after societies have reached a certain level of economic development or when the Government in a given State is legitimate and shows respect for its international human rights obligations. Undoubtedly, it is much more difficult for a human rights institution to operate in adverse socio-economic and political conditions. The European Commission and Court have until now largely operated in constitutional circumstances. The Inter-American Commission has not had that luxury but has not allowed itself to be paralysed by *coups d'état*, massive human rights violations by military dictatorships and regimes not respecting the rule of law, civil conflict and insurgency, and desperate social and economic circumstances.

COMMISSION FUNCTIONS

95. Human rights are about individual human beings. If a regional system is to be meaningful, individuals should enjoy the right of petition. On the other hand, Governments are entitled to consideration. Hence the peti-

tion process should be confidential until the commission nas reached a conclusion. Even then, the procedure of the inter-American system requires that the first, confidential report be sent only to the Government, with recommendations and a statutory period within which the Government in question may comply. Only upon failure to comply would the report be transmitted to the petitioner and published. The non-governmental organizations that represent many petitioners understandably chafe at this asymmetry. It may, however, increase the likelihood of government participation.

96. If Governments are not ready to concede the right of petition in general terms, even for a declaration or a convention of narrow normative range, then the regional system may have no choice but to commence with procedures for gathering information.

Binding decisions or recommendations

97. Should the commission or other entity make binding decisions or issue recommendations? I think that, from a developmental perspective, it is better to begin with recommendations, which carry full power of condemnation, rather than insisting on binding decisions. At a later stage, when the commission has won some acceptance, it is possible to urge States parties to amend their domestic law so that the commission's decisions are enforceable domestically.

On-site visits

98. For the reasons stated earlier, I believe that competence to conduct on-site visits is an important part of the human rights function. Such visits obviously require the agreement and assistance of the Government concerned. The technique of the on-site visit, as it has evolved in the Inter-American Commission, has proved an invaluable instrument in human rights protection and promotion. These investigations serve the interests of petitioners, Governments and the Commission. On-site visits not only enable the Commission to gather information and to verify the information it has received, but also allow Governments to illuminate the context and complexities of situations and, in an economic fashion, permit officials at every level, who are actually engaged in the case in question, to address the Commission. Finally, on-site visits incorporate an inherent enforcement potential. There is a fair amount of empirical data showing that the mere presence of an outside, authoritative human rights group tends to deter human rights violations. The European method involves meetings with the Government concerned to fix the time, place and manner of investigation or exchange of information.

Types of remedies

99. We have already considered the relative advantages and disadvantages of binding decisions in the form of, for example, judgements and recommendations. More generally, the designers of a human rights mechanism may select from such diverse functions as monitoring, fact-finding, reporting, etc. Some of these techniques are fully decisional, while others essentially invoke the decision of another body. When, as in the African context, the body to which the invocation is sent is entirely political, there are advantages and disadvantages. On the positive side, this politicization may encourage some States that would not otherwise participate to enter the system, confident that their problems will be appraised in a political context. On the negative side, politicization often means a departure from the standards that have been prescribed, the very reason why independent human rights commissions were invented. Another consideration for designers is whether the mechanism should have the competence to order and liquidate damages.

Government representatives or a committee of experts

100. In designing a commission, a choice must be made between a commission of experts, whose members are elected in their private capacity and operate independently of their Governments, or a commission in which each State party may nominate one member. The second arrangement also insists on independence and neutrality, but it is not quite the same as the first. There are arguments to be made for both arrangements and, in the light of the European experience, the second model needs no apologies. I would suggest, however, that the commission of experts' model will likely win wider recognition more quickly, especially in a context in which there are deep political divisions between some of the Governments.

Skill profiles of members

101. If a regional commission is designed to perform both juridical and quasi-diplomatic roles, its membership should reflect a diversity of backgrounds and experience, not least political and diplomatic. Because the supervision of the implementation by Governments of human rights obligations is at the interface of law and diplomacy, the supervisory body should have both competences. The implementation of human rights norms frequently involves negotiation at the diplomatic level with national political organs, hence an explicit diplomatic competence is critical. The use of "quiet diplomacy" can expand a commission's "tool-box" in important ways. It permits a human rights commission not only to be critical and cen-

sorial (which is often the appropriate course to take), but also, when the circumstances warrant, to work quietly with Governments to help fashion domestic arrangements which are consistent with the international human rights obligations that they have undertaken.

102. Non-governmental organizations sometimes lament the fact that not all the members elected to the European or Inter-American Commissions are practising human rights lawyers with rich backgrounds in that field. In my view, uniformity would be a mistake for an intergovernmental human rights body, particularly for one that is just beginning. Members of the Inter-American Commission have been professors, human rights activists, former foreign ministers, Attorneys General, Solicitors-General, diplomats and practising lawyers. Diplomats and former ministers bring a depth of understanding of how Governments work and the nuances of the operational code of diplomacy. These understandings inform the work of the Commission and, at the same time, give government personnel the assurance that there are members of the Commission who understand, from profound experience, the reality which they inhabit and the problems which they encounter.

Professional staff

103. The recruitment of professional staff and, in particular, the executive director is critical. There are ample guidelines on standards for the international civil service and they should be applied rigorously. Appointments should be made on the basis of merit. In order to maintain morale, the secretariat staff should be subject to an administrative review system. For reasons of economy, it would probably be best to incorporate the administrative tribunal of the Asian Development Bank rather than create another administrative tribunal.

104. One exception is the executive director, who should be appointed by and serve at the pleasure of the commission. This is a critical post and if the incumbent has lost the confidence of the members of the commission, he or she should leave. This can be arranged by prescribing in regulations that the post is terminable upon relatively short notice.

105. The number of staff should be sufficient and there must be an adequate budget.

Must there be a court?

106. Many in the human rights community contend that a good regional arrangement incorporates a commission and a court. Several years

ago, members of the European Commission and Court, the Inter-American Commission and Court, and the African Commission on Human and Peoples' Rights met in Strasbourg for a day of informal and off-the-record discussions. Much of the discussion focused on the formidable and enormously complex problems that the African Commission faced. Late in the day, one of the people present stated in emphatic terms that what the African system really needed now was a court of human rights. The members of the African Commission who were present listened without comment, but the expressions on their faces indicated a profound scepticism. How would a court solve or even address the human rights problems of that continent which they had been describing?

107. The proposal was so characteristic of human rights discussions. One hears it not only with regard to Africa, but also for the Balkans, the Middle East, Chechnya, Chiapas, Nagorno-Karabakh—for virtually every place where there is or has been a serious and complex human rights problem. Judicial romanticism, the belief that if a court could only be established it would bring law and order to the most unruly political situation, is common among human rights lawyers. It assigns almost magical, alchemical qualities to what a court can do, if it is only established and given the chance to issue its judgements. The belief is a virtual article of faith that is oblivious to context and stone-deaf to contrary experience. This article of faith has many problems, but one, which is particularly relevant to our discussion, is its failure to take account of the fundamental distinction that jurists have drawn since the time of Aristotle: the distinction between corrective and distributive or developmental justice. Corrective justice involves the application of pre-existing law to a particular case and the specification of a predetermined remedy in case of a finding that the law has been violated. Distributive or developmental justice deals with situations in which the strict application of law will itself disturb public order or be pathogenic, or in which there simply is no law or public order; in these circumstances, the challenge to justice is to develop and evolve norms or even critical parts of the legal infrastructure itself.

108. Courts are effective institutions of corrective justice when at least four cumulative conditions are fulfilled: (*a*) there is pre-existing law that is authoritative and controlling and an agreed-on calculus for generating new norms from general principles; (*b*) the courts are recognized as impartial; (*c*) the other agencies of government will implement the judgements of the courts; (*d*) politically relevant strata of the population are prone to accept the judgements. When these conditions do not exist, courts will not be effective. These conditions do not exist in most of the areas of the world where grave human rights violations—genocide, torture, disappearances, military seizure of power, and so on—recur. Will the human rights programme have done something significant if its primary contribution is to have invented ad-

judicatory bodies for these areas? These areas require the application of developmental justice.

Site of headquarters

109. As a practical matter, most of the information about human rights violations will come from individuals and non-governmental organizations. Hence it is important to design the regional system so that NGOs have regular access. This, in turn, draws attention to the selection of a site for headquarters. One should select a site in a country which demonstrates great support for the idea of the commission, and which has good communications and a willingness to provide some infrastructural support. In addition, there should be a prior commitment to a headquarters agreement, with special emphasis on assurance of entry visas for witnesses and petitioners and minimum privileges for the staff. There are advantages and disadvantages to locating a human rights mechanism at the site of the political headquarters of the organization in question.

V. Conclusions

110. Stimulating or accelerating social development is not easy. University libraries abound with theories of the "natural laws" of how the domestic institutions necessary for the protection of basic human rights evolve. Marx and Hayek, from opposite poles and in different ways, have related it to fundamental economic changes, as does Walt Rostow. Del Vecchio and Roscoe Pound, drawing on Vico, related it to a dynamic that they believed was inherent in the nature of law itself. They thought that they discerned in such a dynamic a progressive evolutionary force, which would ineluctably move all legal systems to the highest sociopolitical plane. Revolutionary theories have promised rapid transformations—the "new order", the "new man", the "new woman"—but the results have been unsatisfactory, if not deplorable. None of these theories seems proven or especially practicable. The international human rights programme has not developed its own theory of how democratic, rule-of-law systems evolve. Its own episodic, pragmatic efforts—for example, in international election observation or in grappling with the problem of amnesties—have not been marked by stunning success.

111. The chances of establishing a common panacea, a "one-size-fits-all" theory that can guide action, seem small. It is clear that many social, economic and cultural factors go into the establishment of a self-sustaining democratic and human rights-based national system; if there are universally valid key variables, they have yet to be identified. Here, as in so

many other areas of decision, we must operate with partial knowledge and incomplete information. The question for the international system must always be case- and context-specific. What are the urgent human rights priorities in State X or for general problem Y? What available international institutions are likely to contribute to securing them? What new institutional arrangements, designed to deal with the specific problem at hand, can be shaped?

112. As a methodological matter, I would suggest that each inquiry about the addition of a dispute-resolution mechanism for human rights protection begin with what Amitai Etzioni has called "wide scanning" of the horizon to determine the aggregate human rights problems. In that aggregate, one must identify which are the most urgent matters and which, if treated, are most likely to ignite developmental consequences that improve the human rights situation. One of the problems with the adjudicative model is the "squeaky wheel" syndrome: adjudication only brings to the attention of community decision makers the case of a single individual, often one who has the political maturity, courage and financial resources to press a case. The squeaky wheel may not be the wheel in most urgent need of attention. Wide scanning informs the observer as to which are the most urgent human rights areas.

113. Sometimes, the particularistic, case-oriented corrective model, culminating in judicial remedies, sanctions or criminal penalties, will be the appropriate one and it should be used. But sometimes wide scanning will indicate that particularistic approaches will simply miss the point or, worse, aggravate the human rights situation. Then, mediatory, conciliatory or negotiative models may be indicated, using indulgences rather than deprivations, bribes rather than penalties.

114. Our common goal is always the termination of grave and often systemic violations of human rights and the initiation of a process of reconstruction; ancillary goals are prevention, deterrence, correction and rehabilitation. The questions, in each case, are what are the most economic means available for accomplishing those goals and, after the rhetoric and ballyhoo are discounted, what resources are actually available? In short, what is really feasible?

115. A regional human rights system can be an important instrument in sustaining constitutional democracies and facilitating the fulfilment of human rights that are now universally recognised. The systems are created by individuals who are located in governments and who are committed to the basic values of the modern international human rights movement: democracy, humane government and the fulfilment of the basic human rights established by the international system. When a human rights system is in

place, it does not operate on its own. It is used primarily, but not exclusively, by national actors to restrain Governments or individuals purporting to operate with governmental authority from usurping the basic rights of individuals. It can be a useful and sometimes indispensable instrument for the protection of constitutional democracy and individual freedom.

Recent human rights developments in the Asian and Pacific region: national institutions and other factors relevant to regional cooperation

by

BRIAN BURDEKIN*

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I. Introduction[1]

1. The Asian and Pacific region comprises countries of tremendous complexity and cultural diversity. Recent developments in the establishment of national institutions for the promotion and protection of human rights suggest, however, that this rich heritage is no impediment to the creation of structures at the national level which can make a major contribution to the effective realization of those fundamental rights embodied in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Indeed, in the brief period since the adoption of the Vienna Declaration and Programme of Action in June 1993,[2] national institutions with charters premised on the implementation of human rights have grown more rapidly in Asian and Pacific countries than in any other region.

2. It is beyond the scope of this paper to analyse these developments in the detail they deserve. It is, however, possible to illustrate their importance from a human rights perspective by briefly examining their significance—particularly for the most vulnerable and disadvantaged groups in society—and assessing the potential of national institutions as both preventive and remedial instruments in the struggle for human rights.[3]

II. The Paris Principles and relevant resolutions of the General Assembly and Commission on Human Rights

3. To understand the role of national institutions in the promotion and protection of human rights, it is necessary to have at least a working knowledge of:

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[1] This paper was prepared at very short notice due to factors beyond the control of the Centre for Human Rights. At the outset, therefore, I must apologize for any errors or omissions. These will be addressed, in part, in the oral presentation and through the documents distributed to workshop participants.

[2] Adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF.157/24 (Part I), chap. III).

[3] A number of States in the region are cooperating with the United Nations in developing and implementing technical cooperation projects relating to human rights within their jurisdictions. These include: Bhutan, Cambodia, Kuwait, Mongolia, Nepal, Papua New Guinea, Viet Nam and others. The project components focus on the incorporation of international human rights standards into national laws, policies and practices, as well as on the building or strengthening of national institutions capable of promoting and protecting human rights. Activities take the form of expert advisory services, assessment of domestic human rights needs, training courses (for example, for judges, lawyers, police, prison personnel, teachers and non-governmental organizations), workshops, fellowships, and the provision of information and documentation.

(*a*) the internationally accepted benchmark relating to their powers and functions: the Principles relating to the status of national institutions (''Paris Principles'');

(*b*) the resolutions of the Commission on Human Rights and the General Assembly approving the Paris Principles (Commission resolution 1992/54 of 3 March 1992 and General Assembly resolution 48/134 of 20 December 1993.[4]

4. National human rights institutions, as the international community has defined the term, are a very particular species of organization. They do not replace government agencies, the judiciary, parliamentary committees, religious bodies, political parties or non-governmental organizations. Rather, a national institution constitutes a unique and important complement to each of these important partners in the national human rights equation.

5. National human rights institutions, such as human rights commissions, have as their central function the promotion and protection of human rights. In 1993, as noted above, the General Assembly endorsed a set of principles concerning the status, powers and functioning of such institutions for the purpose of encouraging and guiding their establishment. These ''Paris Principles'' prescribe that a national institution must be independent, have as broad a mandate as possible, be characterized by regular and effective functioning, pluralistic and representative composition and adequate funding, and be accessible to the public.

6. Institutions which meet these fundamental criteria may also have the following powers:

(*a*) to submit recommendations, proposals and reports on any matter relating to human rights (including legislative and administrative practices) to the Government, Parliament or any other competent body;

(*b*) to promote conformity of national laws and practices with international human rights standards;

(*c*) to encourage ratification and implementation of international human rights instruments;

(*d*) to contribute to the country reporting procedure under international instruments;

(*e*) to assist in formulating and executing human rights teaching and research programmes and to increase public awareness of human rights through information and education;

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[4] See also Commission on Human Rights resolution 1994/54 of 4 March 1994. For the text of the Paris Principles, see General Assembly resolution 48/134, annex.

(*f*) to cooperate with the United Nations, regional institutions, national institutions of other countries, and non-governmental organizations.

7. Procedures and principles are also prescribed for the role of such institutions in receiving and acting on individual complaints of human rights violations, including:

(*a*) informing the complainant of his or her rights and of available means of redress, and facilitating access to such redress;

(*b*) hearing complaints or referring them to a competent authority;

(*c*) resolving complaints through conciliation, binding decision or other appropriate means;

(*d*) making recommendations to the competent authorities, including proposals for amendment of laws, regulations or administrative practices which obstruct the free exercise of rights.

8. In the context of this workshop and of cooperation at the regional level, it is particularly relevant to note that, in its resolution 1995/50 of 3 March 1995 (para. 7), the Commission on Human Rights requested the Secretary-General to attach high priority to requests from Member States for assistance in the establishment and strengthening of national institutions. The United Nations High Commissioner for Human Rights has, accordingly, made this one of his highest priorities. In the past six months, the majority of his Office's time in this area has been devoted to responding to requests from Asian and Pacific countries relating to:

(*a*) the establishment of national institutions;

(*b*) strengthening existing institutions;

(*c*) advising on appropriate legislation relating to such institutions.

III. Vienna Declaration and Programme of Action

9. In addition to the increasing support for national institutions in the Commission on Human Rights and the General Assembly, all States attending the World Conference on Human Rights in 1993 emphasized the importance which should be attached to the creation of appropriate mechanisms at the national level, as well as to regional arrangements. While the Vienna Declaration and Programme of Action should be read as one complete document, the following extract is particularly relevant to any consideration of appropriate steps which should be taken in the Asian and Pacific region, where previous workshops have underlined the need for a step-by-step approach:

The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and education in human rights.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level. (Part I, para. 36.)

IV. Recent developments relating to national institutions

10. Recent developments relating to national institutions in Asian and Pacific countries can be divided roughly into three categories: States which are currently considering passing legislation to establish such institutions (these include, for example, Nepal, Papua New Guinea and Sri Lanka); States which have recently established national institutions (including India and Indonesia); and States which have recently strengthened their existing institutions (such as Australia and the Philippines).

11. The most significant developments of a tangible nature obviously relate to the new national commissions, each established approximately two years ago, in India and Indonesia. It is perhaps worth noting, in the light of recent debates concerning the complexity and disparate nature of Asia, that these States are among the most populous, culturally diverse and geographically disparate in the world. However, in both cases, the new commissions have already contributed significantly to greater awareness of human rights.

V. Importance of non-governmental organizations

12. It is also important to note that the charters of national human rights commissions already established in the Asian and Pacific region emphasize, either explicitly or implicitly, the important role played by non-governmental organizations and empower the national institutions to work closely with them. In both recent regional meetings involving national commissions, the leaders of all participating institutions stressed the importance which they attach to effective cooperation with the non-governmental community—collaboration not only encouraged but mandated by the Paris Principles. It is essential that the synergy of this relationship is appreciated by Governments currently contemplating the creation of independent national institutions, and that there be no misapprehension that the establishment of such mechanisms in any way minimizes or derogates from the central role which a vigorous non-governmental sector has to play in protecting human rights.

VI. Human rights education

13. As recent massive violations of human rights in other regions (particularly Africa and Europe) have graphically demonstrated, remedial action to stem atrocities emanating from ethnic and religious intolerance is extremely difficult. There is a growing awareness that preventive strategies must therefore increasingly absorb our attention and resources, and that among the most effective of these are appropriate education and training in human rights. Indeed, without education and training, no other preventive strategy can or will succeed. This is the basic premise underlying the United Nations Decade for Human Rights Education, launched in 1995.

14. National human rights institutions have been quick to focus their attention on the need to develop practical strategies for effective education, not only in the more formal settings of primary, secondary and tertiary educational facilities, but also in the critical areas of police, prison, paramilitary, military and security force personnel and related areas. In the past three months, important conferences to address these issues have been hosted by the Philippines Human Rights Commission (in December 1995 in Manila) and the National Human Rights Commission of India (this month in New Delhi).

15. The Manila conference, which focused, significantly, on human rights education for development, produced a consensus among Governments and national institutions attending that:

> Human rights education must embody the right to development, and programme and activities in development must uphold human rights in all its dimensions.

This principle is not only consistent with the International Bill of Human Rights, it also accords appropriate recognition to the central importance of the right to development—a right as yet inadequately recognized in some quarters and of particular significance in Asian and Pacific countries. The principle could therefore constitute a central objective in evolving national plans for human rights, which are envisaged in the Vienna Declaration and Programme of Action and are currently being formulated by a number of States in the region. Indeed, the Manila conference adopted a recommendation that Asian and Pacific States should not only develop national plans, but also:

> ... consider the possibility of drafting a regional plan of action for human rights education, building on the rich cultural heritage of the region in consultation with all concerned sectors.

16. In opening the New Delhi conference, which has just concluded, the President of India described the "ethos of pluralism, vibrant diversity, oneness and universalism" as India's "contribution towards world civilization". Having reviewed India's rich history and reflected on the his-

torical attachment to appropriate recognition of rights, its entrenchment in India's Constitution and its protection by a vigilant judiciary, he nevertheless described the establishment of the National Human Rights Commission as "a major landmark" in the protection of fundamental rights. Having studied the achievements of the Indian Commission (referred to elsewhere in this paper), the author respectfully agrees.

17. Both the New Delhi and Manila conferences were notable for their recognition of the extremely important role which independent national institutions have to play in the promotion and protection of human rights. More specifically, both conferences emphasized that equal importance should be attached to civil and political rights and economic, social and cultural rights—not only by Governments, but also by national institutions and non-governmental organizations.

VII. Accessibility, cultural appropriateness and cost-effectiveness

18. There are several cogent reasons for countries in the Asian and Pacific region to consider seriously the establishment of national institutions specifically charged with the promotion and protection of human rights.

19. The first, and perhaps most important, reason relates to the role of national institutions in educating individuals that they have rights, balanced by responsibilities, which Governments, the private sector and other individuals must respect.

20. The second reason relates to the accessibility of national institutions. There has been a tendency among some Western commentators not only to emphasize civil and political rights at the expense of economic, social and cultural rights, but also to assume that human rights are synonymous with the rule of law, an independent judiciary, free trade unions and freely elected parliaments. These institutions are all important but, in the experience of the author, quite insufficient to ensure respect and protection for the most vulnerable groups in society (including the homeless, indigenous peoples, minorities, those with intellectual disabilities, the mentally ill and others). The reality, even in developed countries, is that the courts are inaccessible to a large proportion of the population because of the extremely high costs involved. (Even among countries with substantial legal aid programmes, very few provide funding to pursue complaints of human rights abuses.)

21. Most of the recently created national institutions have the capacity to investigate complaints without recourse to cumbersome rules of evidence and procedure. Most also have the ability to settle complaints by conciliation or arbitration—procedures which are not only more "cost-

effective'' than more traditional adversarial or inquisitorial procedures, but also more ''user-friendly'' to groups which have traditionally been disempowered and frequently find the trappings of traditional courts quite intimidating.

22. Thirdly, the quasi-judicial nature of national institutions means not only that they are more accessible, but also that they have the capacity to resolve complaints more speedily than the courts. This results in substantial benefits to those whose rights have been abused, as well as to the State, which saves substantially on court administration costs (national institutions remain, of course, like all commissions and tribunals, subject to the jurisdiction of the State's superior court(s) with respect to the proper exercise of their powers).

23. Finally, settling disputes by negotiation, conciliation or arbitration where possible is more culturally appropriate in at least some Asian and Pacific societies. A number of these have, however, inherited court systems from former colonial powers which have, to date, provided the only avenue for any effective redress of human rights violations. This is not, of course, to contend that courts are unimportant—rather that they need to be supplemented by national institutions with charters specifically designed to facilitate the informal, speedy, effective and cheap resolution of complaints.

VIII. National institutions: intranational development, bilateral exchanges and ''subregional'' cooperation—building blocks for regional understanding

24. The Chairman's concluding remarks at the third Asian and Pacific workshop, held in Seoul in July 1994, state:

> ... The workshop has further recognized that the key to enhancing the human rights environment in countries in Asia and the Pacific lies in the strengthening of implementation at the national level. ...

25. In a ''region'' as diverse and heterogeneous as the Asia and the Pacific, it is essential to focus on opportunities for cooperation, enhanced understanding and ''confidence building'' at the intranational, bilateral and subregional levels. Indeed, it may be more constructive to concede at the outset that, in any world other than that of geographers and United Nations officials, Asia and the Pacific can more realistically be characterized and dealt with not as a ''region'', but as a number of regions. (In the author's view, this would facilitate a more realistic and constructive debate concerning human rights cooperation.)

26. One of the problems characterizing debates over ''regional charters'' or ''regional mechanisms'' in Asia and the Pacific over the past dec-

ade has been a tendency to extrapolate from European or other regional models. These can, of course, provide extremely useful precedents. But they need to be considered critically in a context in which regional diversity is so pronounced that it embraces both the largest and the tiniest nation States in the world, in some of which the constituent elements (provinces, states, territories) are both more populous and more diverse than entire countries in other regions. The legitimate response to this extraordinary size and diversity lies not in a search for peculiarly "Asian" or "Pacific" human rights, but in an informed recognition that some "nations" in Asia and the Pacific are virtually "regions" in themselves—with the implications that this carries for protecting, not minimizing, the rights of their citizens. Recognition of this factor is fundamental if we are to produce more light than heat in the sometimes difficult task of convincing "sovereign" Governments that their search for stability and territorial integrity is undermined, rather than facilitated, by suppression of minorities or abuses of the rights of peoples legitimately seeking self-determination within existing, internationally recognized boundaries.

27. It is precisely their capacity to contribute substantially to the realization of the rights of minorities and other vulnerable groups which makes independent national institutions so significant. Democracy alone is no guarantee that the rights of minorities will be protected (be they indigenous or migrant)—as the history of my own country, Australia, clearly demonstrates. Nor is the constitutional entrenchment of human rights (much beloved of lawyers) any guarantee that they will not be frequently and flagrantly violated in practice (including by officials of State-controlled police, paramilitary, security or defence forces). But if there is an independent, autonomous national commission or similar institution with a mandate and appropriate powers to monitor and protect human rights, the demonstrable deficiencies of democratic Governments, constitutional "guarantees" and often inaccessible court systems can be considerably attenuated.

28. First, national human rights commissions can encourage the creation of, and work with, similar institutions at State or provincial level (as the Indian and Australian Commissions have done), transforming the rhetoric of the international instruments into reality for millions of people for whom the term "human rights" has previously had no meaning at all. Secondly, they can do this consistent with the standards prescribed in the international treaties, while accommodating constitutional peculiarities and the extraordinarily different challenges posed by local conditions and cultures—thus respecting ethnic, cultural, religious and linguistic diversity. Thirdly, they can do this in a more informed and sensitive manner than any regional or international body. Fourthly, they can do this without compromising a vigorous defence of the rights of minorities by deference to the wishes of the (sometimes overwhelming) ethnic, linguistic or religious majority—a feat

sometimes beyond the capacity of democratically elected politicians who, in some countries, manifest an increasing tendency to formulate policies according to polls indicating what the majority want, irrespective of what human rights require. Fifthly, national commissions can contribute to and monitor the integrity of government reports to international treaty bodies, reflecting the reality of human rights beyond the perception of bureaucrats ensconced in national capitals. Sixthly, they can provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from "foreigners"—often dismissed by Governments subject to criticism as based on ulterior or illegitimate motives.

29. For these and other reasons, national institutions can therefore enhance national stability and security (and thereby contribute to national development) at the same time as promoting and protecting human rights. They have also demonstrated the capacity rapidly to institute bilateral exchanges with other national institutions in the region, thus contributing significantly to regional understanding and cooperation while enhancing their own skills and refining their strategies for human rights education programmes, complaint handling, etc. (Examples of such exchanges recently include cooperation between the national commissions of India and Australia; the Philippines and India; Indonesia and the Philippines; New Zealand and Australia; and the Philippines and Australia.)

30. As more national institutions emerge in the region—and there may be new national commissions in Sri Lanka and Papua New Guinea by the end of this year—it is likely that various forms of "subregional" cooperation will develop. Indeed, there is already a clear trend of Governments in the region demonstrating their bona fides in the preparatory stages of developing legislation for national institutions by consulting, through the United Nations, "practitioners", who have been involved in established institutions, concerning the powers and functions which their national commissions should enjoy.

31. In the author's own experience it is both clear and demonstrable that national institutions created in accordance with the standards prescribed in the Paris Principles enhance regional cooperation and understanding. Perhaps more importantly, they provide practical redress for human rights abuses to many of the most vulnerable and disadvantaged groups in the countries where they operate—at the same time as rendering Governments more accountable. Finally, they also play an important role in helping both Governments and non-governmental organizations to give practical effect to the international principles they are committed to observe. (Indeed, it is notable that the initial cynicism of some non-governmental organizations concerning the integrity and effectiveness of national institutions has signifi-

cantly dissipated, as the latter have become established and begun to demonstrate their effectiveness.)

IX. National institutions: "preventive strategies" and the changing role of defence, security and military forces

32. Recent experience in a number of Asian and Pacific countries suggests that one of the most important "preventive strategies" for the promotion and effective protection of human rights is appropriate training for defence, security, paramilitary and military personnel. Traditionally, most defence forces have received some training in the basic principles of humanitarian law (the 1949 Geneva Conventions and the Protocols thereto). Few, if any, however, have received appropriate training in the broader principles of human rights. Humanitarian law is, in essence, the application of a limited number of basic human rights concepts in the context of armed conflict. In the author's experience, the difference between this narrower concept and human rights generally is seldom understood among military personnel, or indeed among the civilian officials working in national defence departments.

33. The role of the military in many countries is changing rapidly. First, defence and security forces are increasingly being used in what are essentially "domestic policing operations". A number of the most serious human rights violations which have occurred in recent years have been, at least in part, the result of soldiers or paramilitary forces using excessive force in situations of civilian crowd control—or other functions which should more appropriately be the responsibility of the police. From a human rights perspective, this situation is most undesirable. However, the reality is that this phenomenon is likely to continue in the foreseeable future.

34. Secondly, defence forces are increasingly being used by cost-conscious Governments in disaster-relief or disaster-avoidance situations (for example, floods, earthquakes, typhoons, bush fires). There are numerous recent examples in the Asian and Pacific region. In some cases, the forces involved have some training in humanitarian law; in very few cases do they have any training in human rights. However, in their inevitably close contacts with civilian populations, sometimes over sustained periods, it is the fundamental principles of human rights which are applicable to their behaviour (not the principles of humanitarian law developed for combat situations).

35. Thirdly, it is increasingly common for military contingents from a number of Asian and Pacific countries to serve in international monitoring or peace-keeping operations. In most cases, these assignments involve sus-

tained periods of contact with civilian populations rather than situations in which "rules of engagement" and principles of humanitarian law apply. However, many of the soldiers involved have received little or no training in basic human rights.

36. Fourthly, in a number of countries, the end of recent conflicts in which national armies were involved in their traditional roles has led to significant "force restructuring" in which personnel in substantial numbers have moved from the defence of national borders to duties involving "internal security". In many cases, these forces have been trained as soldiers, but not retrained to operate appropriately in their new roles.

37. National institutions charged with the promotion and protection of human rights can play an extremely important "preventive" role in these situations. In recent meetings involving both national institutions and Governments in this region, there has been virtually unanimous agreement that defence and security personnel cannot realistically be expected to respect human rights if they are not appropriately trained. There are many reasons for this, but, in essence, they relate to the fundamental difference between military objectives, culture and training and respect for the rights of individuals in situations where defence of the nation is not at issue.

38. In some Asian countries, for example the Philippines and India, national human rights commissions are already playing a central role in training the military. (The Philippines Commission has, in recent years, trained more than 50,000 personnel from the national military and police forces.) The results which can be achieved from such training are not only important in human rights terms; events in recent months indicate that they are also "cost-effective" for Governments (which may otherwise face substantial compensation claims when government forces destroy property or assault civilians).

X. National institutions: national action plans

39. On the basis of the Vienna Declaration and Programme of Action, relevant resolutions of the General Assembly and the Commission on Human Rights, the Chairman's concluding remarks at the second and third regional workshops, in Jakarta and Seoul, and finally their own track record, national institutions should clearly have an important role in the formulation of national action plans for the Promotion and Protection of Human Rights.

40. In those States which have already produced such plans (for example, the Philippines), national human rights commissions have played a central role. It is consistent with both the spirit of Vienna and the conclusions of previous regional workshops that the knowledge available in

national institutions should be tapped to ensure that each nation's plan reflects the reality of the people as well as the intentions of the Government.

41. In the author's experience, national institutions are more likely than bureaucratic structures to consult effectively with non-governmental organizations and, through their day-to-day contact with those most vulnerable and disadvantaged groups whose rights are most consistently violated, ensure that national plans accord adequate priority to those who are often voiceless and politically powerless.

Regional human rights arrangements in the Asian and Pacific region: progress made and some options available

by

CLARENCE J. DIAS*

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I. Asia and the Pacific at the crossroads of the centuries: the importance of human rights

1. This fourth workshop for the Asian and Pacific region meets at a unique moment in history. It meets at a time too important for shadow-boxing, recrimination or confrontation. The need of the hour is for good faith and understanding, on the basis of which discussions and deliberations will lead to timely and effective regional cooperation on human rights. The region is being swept by rapid economic, social, cultural and technological change. Today, fewer countries in the Asian and Pacific region are under military regimes than ever before. Democratic spaces are opening up all around the region. Yet countries are encountering many difficulties in the transition to and institutionalization of democracy.

2. Peace accords are at work in parts of the region where this would have been unthinkable at the start of the decade. But the region is still far from free of internal armed conflicts, and tensions keep mounting between ethnic, religious and other groups. The end of the cold war raised hopes of a "peace dividend". Yet military expenditure continues to grow in the region and, in the view of some political analysts, there is the prospect that a trade war might replace the cold war. The Asian and Pacific region has registered the highest economic growth rates in the world. Yet it also contains some of the world's poorest countries and the very wealth of the region is making it a possible target for envy and greed. Technological revolutions in the fields of communications, informatics and biotechnology offer unique new opportunities for realizing all human rights for all. Yet Asian and Pacific countries are encountering serious difficulties in gaining access to such technologies on equitable terms. Moreover, the technologies being exported to the region raise grave concerns as to their environmental impact. Globalization of the world economy does offer new opportunities for economic growth of some of the countries of the region, but for other countries globalization may bring further marginalization and impoverishment. Moreover, as recognized at the World Summit for Social Development in March last year, the rapid pace of globalization is causing, at times, severe social and human disruptions, creating the need for "safety nets".

3. There has been much progress on human rights in the region. Women's rights have been firmly recognized as human rights. Yet in some parts of the region we witness the obdurate survival of patriarchy and violence against women.

4. There is growing recognition in the developed world of the importance of economic, social and cultural rights and, unanimously (by consensus, not vote), the right to development has been reaffirmed as "a universal and inalienable right and an integral part of fundamental human rights" at Vienna, Cairo, Copenhagen and Beijing. But in this region we need to guard against trade-offs between economic, social and cultural rights and civil and political rights in the name of development. Such trade-offs undermine the very indivisibility and interdependence of all human rights. The indivisibility, interdependence and universality of human rights are essential in rejecting spurious use of conditionalities in trade, development and foreign relations.

5. In sum, in this period of unparalleled rapid economic, social and technological change being witnessed in the region, human rights provide both an anchor and ballast. Active promotion and protection of human rights are vital to maximizing the beneficial and minimizing the adverse impacts of the rapid change that is sweeping through the Asian and Pacific region today.

II. The long road to Kathmandu

6. Individual, collective and institutional amnesia is the bane of progress. Fortunately, no such amnesia exists regarding the efforts to work towards regional arrangements for the promotion and protection of human rights in the Asian and Pacific region.

7. The first step on the road to Kathmandu was taken in Colombo as long ago as 1982 when the United Nations Centre for Human Rights organized the Seminar on National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region.

8. The focus was on Asia and, while the Governments present felt that it was premature to think of regional arrangements, they recommended that periodic regional and subregional meetings of government representatives and recognized experts should be held on human rights issues.

9. Since then, the Centre for Human Rights has organized three Asian and Pacific regional workshops on human rights issues. The first of these took place in Manila in 1990. The topic of regional arrangements was only one of several topics covered. Since it was an initial workshop, the topics of standard-setting, United Nations mechanisms, national institutions, human rights awareness, and legislation, implementation and information functions were also dealt with. So far as the regional arrangements topic was concerned, there were three presentations describing the regional experiences of the African, European and inter-American arrangements. The questions asked, and the issues raised, were important in gaining an understanding of regional arrangements. These included:

(*a*) What are the advantages and disadvantages of a regional system? The reply was that it was easier to create a system within a homogeneous group and that such a system could go further and adopt even more stringent standards than the international system. Understandably, this response failed to make an impact, since Asia and the Pacific is one of the least homogeneous of regions.

(*b*) What happens if States refuse to abide by or ignore standards or decisions? The responses varied as to region. In some regions the decisions were binding. In others, they were merely persuasive.

(*c*) What limitations do declarations of states of emergency and national security exemptions impose on regional arrangements? Here, too, the responses varied. In Europe, there was power of judicial review to determine whether an emergency really did exist.

(*d*) What happens in situations of conflict between national law and regional law? Here, in most cases, the latter would prevail.

(*e*) What is the extent of access and input by non-governmental organizations in the regional system? Once again, for Europe such access was significant.

10. From the nature of the questions asked, it is clear that participants were mainly concerned about the effectiveness of a regional system and the extent of derogation of national sovereignty that would be involved.

11. The Manila workshop served to clear the air and indicated that a range of different regional arrangements were possible. The second workshop, held in Jakarta in 1993, made further progress. Here, once again, the topic of regional arrangements was only one of several covered, together with the topics of international norms and standards, national implementation of international standards, national institutions and the forthcoming World Conference on Human Rights. There were two sessions on the topic of regional arrangements. The first session focused on regional machinery and the second took a broader view of intraregional cooperation, including bilateral exchange of information and practical assistance. The purpose of the sessions was to identity ways in which obstacles to the establishment of a regional system for the promotion and protection of human rights could be overcome. The obstacles identified included:

(*a*) the fact that Asia and the Pacific was not a homogeneous area. Hence there were pleas to be realistic. It was cautioned that plans to establish regional human rights machinery should take into account the geographical complexity, diversity and vastness of the countries which formed the region, as well as their different historical backgrounds and levels of political stability, economic prosperity and social development;

(*b*) the lack of any unifying tradition;

(*c*) the fact that an effective regional arrangement required high levels of mutual understanding between Governments. It was suggested that such understanding could be fostered, at least during the early stages, by the development of subregional machinery.

12. Participants were not yet ready for specific proposals, but the majority appeared to be satisfied with a general expression of willingness to work towards the development of human rights machinery at the regional or subregional level. There was agreement that:

(*a*) such a mechanism would not attempt to duplicate the human rights systems which had been set up in other regions of the world;

(*b*) each United Nations-defined region was able to benefit from the knowledge and experience of the others;

(*c*) human rights could be best promoted through the establishment of a forum for exchange of experience and information. Such a forum could well prove to be the first step in an ongoing process to institutionalize human rights protection at the regional level.

13. The Chairman's concluding remarks at Jakarta noted the progress already made at the subregional level and called for a step-by-step strategy towards regional arrangements. A first step could be the setting up of subregional machinery for human rights information dissemination. This could be followed, for example, by the establishing of an Asia Forum which could enhance regional exchange of ideas and experience aimed at promoting human rights activities. The Forum could be used, at a later stage, to design machinery at the subregional or regional level for the promotion and protection of human rights.

14. The third workshop, held in Seoul in 1994, succeeded in identifying common ground and better understanding among countries in the region and was able to build upon the consensus achieved in Jakarta in 1993. The workshop included two sessions on regional arrangements: one focusing on recent initiatives and the other on practical considerations regarding the establishment of a regional human rights mechanism. The general agreements reached in Seoul form the starting-point of our work in Kathmandu now. In Seoul, the Chairman's concluding remarks summed up the following views expressed at the workshop:

(*a*) Regional cooperation should, where appropriate, begin through subregional initiatives.

(*b*) Parallel with subregional initiatives, there should be an annual United Nations Forum for the Asian and Pacific Region on Human Rights Issues, which would allow countries in the region to benefit from initiatives taken at the subregional and national levels.

(*c*) The key to enhancing the human rights environment in countries in Asia and the Pacific lies in the strengthening of implementation at the national level.

(*d*) Development of a regional arrangement should be through a step-by-step approach. This building-block approach recognizes that there are different "speeds" in the region, calling for an evolutionary model.

15. The workshop unequivocally reaffirmed that all human rights are universal, indivisible, interdependent and ir terrelated. It also reaffirmed the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues. The diverse cultural, historical and political particularities and the different levels of development in the region did indeed play a significant role. Yet those same differences gave the region its

unique character. In recognizing that, and in mutual respect among Asian and Pacific nations, lay the foundation and opportunity for regional cooperation in the field of human rights. Indeed, in the very diversity of the region lay its strength.

16. The challenge from Seoul to Kathmandu lies in harnessing such strength from diversity into concrete next steps for the better promotion and protection of human rights through national, subregional and regional initiatives—initiatives agreed on here in Kathmandu.

17. Such initiatives are long overdue, since the Asian and Pacific region is the only region in the world regarding which, from 1985 to date, the Commission on Human Rights has annually adopted a resolution appealing for States to consider agreements with a view to establishing regional human rights arrangements. The General Assembly has requested the Secretary-General to give priority under the advisory services programme to the countries of the region to help facilitate such a process. The Assembly has also called upon the Secretary-General to submit periodic progress reports on the subject and has requested the Commission on Human Rights to continue to pay special attention to the most appropriate ways of assisting the countries of the region, at their request, in working towards a regional arrangement.

18. On 4 March 1994, the Commission on Human Rights adopted resolution 1994/48, entitled "Regional arrangements for the promotion and protection of human rights in the Asian and Pacific Region", in which it:

(*a*) appealed to all Governments in the region to avail themselves of advisory services to facilitate the process towards regional arrangements;

(*b*) requested the Secretary-General to consult all States in the region, on the widest possible basis, towards that end.

19. The Secretary-General requested all Governments in the region to forward their views on the subject and, in a November 1994 report, published the views he had received. His call to United Nations development agencies in the region to furnish such information as they might have appears to have fallen on deaf ears. But non-governmental organizations are contributing to the process, as acknowledged in the Secretary-General's report. The Secretary-General also keeps track, on an annual basis, of progress made in the ratification of international human rights instruments by the States of the region. In 1995, too, similar resolutions and reports were issued.

20. The spotlight of the world is on the Asian and Pacific region. The resources and services of the United Nations system are pledged to the region. Will history recall that the region was called upon and found wanting? Or will Kathmandu be remembered as the place where the call was

responded to in a manner befitting this proud region of the world—a region which truly needs to establish an enabling environment for human rights, development and peace?

III. Towards regional arrangements on human rights: some options for regional cooperation

21. It seems clear from the three previous workshops that regional human rights arrangements for the Asian and Pacific region will involve a long-drawn-out process of negotiations, drafting and implementation. But such a process need not be an "all or nothing" one. Indeed, it is vital, if it is to succeed, that the process be an evolutionary one in which regional cooperation on human rights starts immediately even though a fully-fledged regional human rights arrangement comes several years later. Several regional cooperation activities are possible now and could be undertaken not as alternatives to one another, but rather as building blocks, which complement one another and demonstrate that working relationships and mechanisms are possible. Out of such a process, confidence is built, institutional arrangements evolve and the human resources needed for successful implementation may be identified and expertise developed further. Of course, the usefulness of working at a subregional level, at a thematic level (e.g. on trafficking in women) and at a sectoral level (e.g. on indigenous people) must also be stressed.

22. Some options for regional or subregional cooperation are presented below in summary form, as catalysts to discussion, consideration and possible action.

(a) *A fully-fledged regional or subregional human rights system comprising a regional charter, a regional commission and a regional court.* (Note: The word "regional" here, as in the other proposed options, also implies "subregional".)

Historically, the process of arriving at a regional human rights system has involved a linear progression from charter to commission to court. However, for this region, it may be useful to consider different sequences, for example from commission to charter to court—where a commission could be set up whose first act might be to draft a charter; or from commission to court to charter—where a commission's first act would be to set up a court and where the charter would evolve from the decisions of the court. Michael Reisman's papers for the Seoul workshop and for this workshop contain much very useful technical information regarding the forms of jurisdiction of a commission; procedures applicable, for example, to petitions, country reports and studies;

applicable law; impunity; the role of non-governmental organizations (NGOs); etc. He deals strategically with the three key issues: the nature of the legal instrument to be negotiated; the normative range of the instrument; and the range of participation being sought. He also deals with interrelationships between these three key issues. The two papers provide a useful head start for Asian and Pacific Governments. This workshop could perhaps agree on broad principles relating to those issues and set up a small intergovernmental working group (with subregional representation determined perhaps by each subregion itself) to draft an instrument for further consideration and revision at the next workshop, planned for late in 1996.

There have been several Asian NGO initiatives and these could be used as a point of departure by any intergovernmental working group involved in drafting. But it is crucial to note the differences between a regional human rights charter drawn up by NGOs and a regional human rights covenant adopted by Governments. The NGO initiative comes as a response to those who assert that human rights are a Western concept, insensitive to Asian and Pacific cultural traditions. NGO charters and declarations seek to show the relevance of human rights to Asian and Pacific societies. They thus seek to catalyse among Governments and NGOs a discussion on fundamental issues and human rights concepts. NGO charters and declarations obviously cannot deal with enforcement issues, but once again they can serve to initiate a discussion on problems of enforcement. NGO charters and declarations are also meant as a vehicle for human rights education and to develop solidarity action. Thus they often tend to be reactive and drawn empirically from patterns of existing human rights abuses and denials. Hence, at best, for intergovernmental purposes they can serve as a point of departure. The objectives of a regional intergovernmental covenant, however, are different (even though the two texts are not mutually exclusive). Such a covenant should seek to:

(i) reiterate and reaffirm existing international human rights standards;

(ii) contextualize such international standards;

(iii) concretize such international standards to enhance their applicability to Asian and Pacific situations;

(iv) prioritize, on the basis of human rights issues which especially require a regional approach;

(v) provide mechanisms for access and redress.

The function of a regional charter is to level up to and beyond the existing international human rights standards and to fill in gaps experienced at the regional level. In no case can a regional charter be used to level down the international human rights standards to the lowest common denominator of acceptance. To ensure this, any regional or subregional arrangement in the Asian and Pacific region (or any of its subregions) should comply with the basic principles laid down in the Bangkok Declaration (adopted by some 240 participants, representing some 110 NGOs, attending the Asian and Pacific NGO Conference in Bangkok in 1993). Such compliance is necessary not merely because the NGOs so emphasize, but also, importantly, to ensure the credibility (both domestically and internationally) of the mechanism. Similarly, any regional or subregional commission should also comply with those of the Paris Principles on national human rights institutions[1] as are appropriate for regional institutions as well.

(b) *Creation of a regional monitoring and enforcement mechanism even without a regional charter*

Obviously, such a regional mechanism could not override the authority of existing international mechanisms. But it could constitute a significant step in the "exhaustion of local remedies" process. In any case, monitoring is more accurately done (or at least less inaccurately done) at the regional, rather than at the international level.

Such a regional monitoring and enforcement mechanism would obviously have to apply international human rights standards, and here again at least three options are open:

(i) it could apply all international human rights norms and standards;

(ii) it could apply only those international standards that are contained in customary international law;

(iii) it could apply, initially, only standards in those covenants and conventions that are more widely ratified in the region, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. But if this is the option chosen, it must be accompanied by a good-faith commitment by Governments to review and ratify, as quickly as possible, as many of the international human rights instruments as possible.

[1] Principles relating to the status of national institutions (see General Assembly resolution 48/134 of 20 December 1993, annex).

(c) *Developing a regional human rights jurisprudence through the judiciary*

This appears to be a desirable option, especially for those countries which have effectively functioning judiciaries. Several workshops have been held in different parts of the region on the role of the judiciary in incorporating international human rights standards into national law. There are several avenues open to the courts:

(i) they could incorporate standards contained in instruments which have been ratified, but for which no national implementing legislation exists;

(ii) they could incorporate standards contained in customary international law;

(iii) they could use standards contained in instruments which have not been ratified as a guide to interpretation of provisions of national constitutions and laws;

(iv) they could apply the latter standards the way they would apply the directive principle in national constitutions—not as fully justiciable, not to compel State action in performance, but to prohibit State action which contravenes such standards.

If this option is to be pursued, at least two practical steps will need to be taken, namely the convening of two separate informal expert group workshops, as outlined below (the participants being government legal and judicial experts and a few international human rights experts representing the United Nations Centre for Human Rights):

(i) the first workshop would review the various previous judiciary workshops held in the region and work towards a plan for initiating future interaction among members of the judiciary in the Asian and Pacific region;

(ii) the second workshop would seek to restate those international human rights standards which are now *jus cogens* and part of customary international law. What would make this workshop unique is that this restatement would come from a group of legal and judicial experts from the Asian and Pacific region.

Clearly, this option of developing a human rights jurisprudence is one that could be more easily pursued at the subregional level, but certain aspects could be pursued at the regional level as well—and concurrently with the subregional initiatives. This option obviously addresses interim, stopgap needs; but, equally, it would make invaluable contributions towards a regional charter.

(d) *Regional cooperation on specific, shared human rights problem areas*

Several of the human rights problems in the region cross national boundaries. There is already subregional cooperation when problems relate to national security across national boundaries (e.g. terrorism, drug trafficking). Thus, in areas where both redress and prevention of human rights violations require transborder cooperation, there is every incentive for human rights cooperation on a bilateral, subregional or regional basis, as appropriate. Four examples, drawn from the South Asian Association for Regional Cooperation (SAARC) area, may help to illustrate this approach:

(i) trafficking in women;

(ii) migrant workers;

(iii) refugees;

(iv) indigenous peoples.

In each of the above examples, the problems are of a transborder nature and addressing them requires transborder cooperation. However, these are rarely perceived as human rights problems and thus an important resource in addressing them, namely international human rights standards, are rarely perceived as part of the solution. It is important, therefore, to have the Governments concerned carefully examine the applicable international human rights norms and standards and select regional approaches which adopt the relevant norms and incorporate them into a regional cooperation agreement. This would enable Governments to apply the norms through the regional agreement without having to ratify the related international instrument. Their experience in working with the norms could help States to decide whether to ratify the related human rights instrument or to press for revision of the instrument to make it more effective (on the basis of real-life experience with problems relating, for example, to migrant workers). Such revisions, if adopted, would give a State the incentive to ratify the instrument. This option would seem especially attractive to Governments in situations where violations are largely by non-State actors, but the State's failure adequately to protect against such violations becomes a source of international embarrassment. This option also holds out the promise of enabling Asian and Pacific Governments to take the lead in standard-setting efforts in the future. It would also enable the Governments of the subregion to "level the playing field" by applying common international norms (e.g. on refugees). The experience of regional cooperation and working together in a limited area could well help to build a basis for more broad-based regional human rights cooperation in the future. The experience of working together could also help to lay the basis for

enacting a regional convention dealing with the specific problem—a regional convention rooted in regional experiences.

(e) *Regional cooperation on a thematic basis*

Although human rights purists would deplore an approach that selects certain human rights themes and not others, the reality for most Asian and Pacific Governments is that they are in the insidious position of having to prioritize among competing human rights problems that compel action or specific human rights issues that have a compelling significance. Prioritization for action is quite different from the trade-off approach. Often there is little prior experience, anywhere, regarding such themes and, if expertise is to be developed, it must be developed by the Governments concerned themselves. This can be better done collectively than individually. Two examples of a thematic approach may help to elucidate what such an approach might entail:

(i) *Human rights in peace accords, and in the rehabilitation and reconstruction of conflict-damaged areas*

In countries which are emerging from conflict, human rights have multiple roles: in setting the parameters for negotiations and the terms of the peace accord; in dealing with issues of accountability and impunity; in ensuring that human rights are respected in the processes of rehabilitation and reconstruction. Most of these issues can be better addressed at a regional level (among countries which share common problems and, therefore, common experiences). Here the basis for collective cooperation is that of a shared concern and characteristic (e.g. countries emerging from armed conflicts), rather than regional considerations. But the regional dimension has a bearing as well, because, although the painfully learned experiences in, for example, Rwanda or the former Yugoslavia are clearly of interest, they are also of quite limited relevance to countries in the Asian and Pacific region. Moreover, a regional approach is also justified by the fact that neighbouring countries are often the guarantors in a peace accord.

(ii) *Human rights in development and the right to development as a human right*

This is clearly a theme of great importance to the developing country Governments of the region. These Governments will increasingly be faced by demands from their people for greater realization of their right to development. Moreover, development

which promotes and protects human rights is more likely to receive donor support (given present-day fierce competition for limited donor resources). Development which is increasingly problematic in human rights terms (e.g. development projects which cause large-scale displacement and forced resettlement) is less likely to command donor support. Moreover, a deteriorating human rights situation in a country is likely to invoke human rights conditionalities from donors as a prerequisite for their development cooperation. Thus, for a variety of reasons, Governments may well have the incentive to participate in regional human rights cooperation around this theme. The benefits from such regional cooperation would be very similar to those of the immediately preceding option above. Additionally, in both cases, regional as well as national expertise and human resources would be developed and participating countries would benefit considerably when the time came for them to fulfil country-reporting requirements under treaty obligations.

In both cases, however, very little experience exists and hence the dimensions and contours of a regional cooperation programme would need to be carefully worked out through a process of consultation, discussion and pilot efforts built around the conventional human rights activities of standard-setting, monitoring, implementation enforcement, human rights education, technical assistance and advisory services. In this case (and that of the immediately preceding option), if the Asian and Pacific region moved ahead it would be undertaking pioneering work of relevance not only to other regions of the developing world, such as Africa and Latin America, but also to countries in transition and to the newly independent States in Eastern Europe and the former Soviet Union.

(f) *Developing concurrent national programmes as a precursor to regional cooperation*

Clearly, a strong regional programme necessitates strong national human rights institutions as well. Thus programmes to strengthen national institutions (e.g. the judiciary, law enforcement officers, parliaments) could be designed from perspectives of regional comparability and undertaken concurrently, especially within a subregion. This could lay a very sound foundation for future regional cooperation.

A special look needs to be taken at the few countries which are seeking to introduce national programmes for the promotion and protection of human rights and which have sought the assistance of the United

Nations Centre for Human Rights (under its advisory services programme) and/or the United Nations Development Programme (UNDP) in this regard. More countries in the region should be encouraged to consider seriously the possibility of initiating such national programmes. Actively sharing experience within the region would not only help to strengthen such programmes and make them more effective, but also facilitate the process and progress towards regional cooperation.

(g) *Developing common regional policies and procedures to facilitate the work of United Nations human rights treaty bodies and special mechanisms*

Governments tend to be hostile at worst, or indifferent at best, towards these United Nations human rights bodies. It is important that such attitudes be changed and one possible step in that direction might result from a project of regional cooperation to help Governments better comply with their country-reporting obligations in regard to such bodies. Here again, the United Nations Centre for Human Rights could render significant technical support to such an initiative.

(h) *Developing a regional human rights education programme in the context of the United Nations Decade for Human Rights Education*

Human rights education can be a most effective method of achieving prevention, empowerment, accountability and compliance. But any programme of human rights education—national, subregional or regional—must be built around the needs, priorities and experiences of the region. This is a daunting task indeed, if undertaken alone. But if NGO experience is any guide in the matter, regional cooperation in developing programmes of human rights education has helped to overcome problems of isolation and limited outreach, as well as the problem of limited human, material and educational resources. Needless to say there is a human rights education component implicit in all the options proposed above.

(i) *Building human rights mechanisms into existing regional cooperation arrangements, such as the Association of South-East Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), the Arab League, the South Pacific Forum, and possibly the Asia-Pacific Economic Cooperation forum (APEC) and the ASEAN Free Trade Area (AFTA)*

Here, one needs to tread carefully. Many of these regional cooperation mechanisms may have priorities in conflict with those of human rights and many of them may accord human rights a very low priority. In the case of regional trade blocs, special problems arise in attempting to address human rights issues by linking them with trade. On an international level, the question of linking social and environmental clauses to the General Agreement on Tariffs and Trade and the World Trade Organization has been a highly controversial one, arousing heated emotions on both sides and smacking more than a little of new conditionalities, double standards and selectivity rather than objectivity in application. Before rushing into efforts to build human rights mechanisms into such regional cooperation arrangements, it would perhaps be prudent to develop their capacity for providing a regional human rights forum (in which quiet diplomacy and confidentiality would be key watchwords) and in serving as a third party in a new form of tripartite policy dialogue.

For reasons of brevity—and because of their complexity—the treatment of the above options is far from definitive. But despite the risk of superficiality, these options are put forward precisely as catalysts in the search for a diversity of approaches. A caveat must be sounded, however, lest some of the relatively "soft" options be used in fact to preclude the "hard" option of a fully-fledged regional arrangement. The options, quite to the contrary, are intended very much to serve as building blocks towards such a fully-fledged regional arrangement and to demonstrate that much can be done, even during the lengthy "interregnum" that might inevitably precede subregional and regional human rights arrangements in the Asian and Pacific region.

IV. Confronting constraints and overcoming obstacles: some practical next steps

23. The obstacles to regional human rights cooperation are legion and well-documented in the region. Some of the objections are well-founded and must be acknowledged and addressed if the obstacles are to be overcome. There is well-founded distrust in the opportunistic invocation of human rights in foreign policy as an instrument for domination by the sole-surviving super-Power today. Such misuse of human rights must be exposed and ended if any progress is to be achieved. "Do as I say, don't do as I do" can no longer be accepted as the basis for international human rights cooperation. Yet, at the same time, "Physician, heal thyself" cannot provide the sole basis for a replacement.

24. Cultural relativity is all too often, and glibly, invoked in dialogues on human rights in Asia. The universality of human rights is an existential reality for the peoples of the region, who time and again are asserting and claiming their rights not only as Asians, but as human beings. A careful look at the present-day critics of universality reveals them also to be those who, for one reason or another, wish to justify denials and thwart assertions of human rights in relation to some sections of society, be they women, indigenous people or minorities. Yet, for the peoples of the region, the universality of human rights is already an empirically verifiable reality.

25. Subregional and regional conflicts and subregional and regional competitiveness and rivalries clearly constitute formidable obstacles to regional human rights cooperation. Yet, ironically enough, regional human rights cooperation provides the swiftest and most enduring remedy against such rivalries and conflicts. Indeed, the possible gains from regional human rights cooperation are all too frequently overlooked. They include improved relations between countries, enhanced economic cooperation on a mutually beneficial basis and the strengthening of the region as a whole.

26. For the first time in history, the Asian and Pacific region has the economic strength and potential to address the developed world not as mendicant, not as supplicant, but as an equal in the negotiation of a partnership based on dignity and respect. Indeed, the time has come for the region to address the whole world as a leader in the glorious undertaking of promotion and protection of all human rights for all, especially that most cherished of all rights—the right to be human.

27. For this to happen, however, practical steps need to be taken at the national, subregional and regional levels. A specific blend of options needs to be adopted. Leadership needs to be assumed by either one or more countries to undertake the follow-up necessary for each option chosen. This follow-up may well involve national consultations and deliberations, subregional working groups and task forces, and goals and tasks set to be accomplished within time-frames as close as the next Asian and Pacific human rights workshop or as distant as the year 2000 in terms of health and education for all. Ratification of international human rights instruments must become a priority. Existing treaty obligations must be fully met. Only then will the culture of the region be truly a culture of human rights and a culture of peace and development as well.

IX. PROGRAMME OF THE WORKSHOP

Monday, 26 February 1996

Morning	Opening address by Dr. Prakash Chandra Lohani, Minister for Foreign Affairs of Nepal
	Opening address by Mr. José Ayala-Lasso, United Nations High Commissioner for Human Rights
	Introduction to the workshop and adoption of the programme
	Representative of the United Nations High Commissioner for Human Rights/Centre for Human Rights
	Representative of the Government of Nepal
Afternoon	Establishment of a regional human rights arrangement in the Asian and Pacific region: experiences of other regions
	Discussion
	Recent human rights developments in the Asian and Pacific region
	Discussion

Tuesday, 27 February 1996

Morning	Establishment of a regional human rights arrangement in the Asian and Pacific Region: progress made and options available
	Discussion

Afternoon

WORKING SESSION I

Organization of the work of working session I

Establishment of a regional human rights arrangement in the Asian and Pacific region

Experiences of other regions

Human rights developments in the Asian and Pacific region

Conclusions

Wednesday, 28 February 1996

Morning

Distribution and review of the draft workshop conclusions

WORKING SESSION II

Presentation of the draft workshop conclusions

Discussion of the draft workshop conclusions

Afternoon

PLENARY SESSION

Adoption of the draft report

Preparations for the fifth Asian and Pacific workshop

Closing statements

Representative of the United Nations High Commissioner for Human Rights/Centre for Human Rights

Representative of the Government of Nepal

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